

8-25-2011

Keybank Nat'l Ass'n v. Pal I, LLC Clerk's Record v. 1 Dckt. 38645

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LAW CLERK

Supreme Court No. 38645-2011

Volume No. 1

Vol. 1 of 2

IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

KEYBANK NATIONAL ASSOCIATION

a national banking association

PLAINTIFF- RESPONDENT

VS SEE AUGMENTATION RECORD

PAL I, LLC, an Idaho Limited Liability Co.

DEFENDANT-APPELLANT

and

BRIAN CHRISTENSEN, an individual; L A
PARKINSON, an individual; BARNEY DAIRY, INC.;
DJ BARNEY, an individual; WILLIAM DAVIS, an
Individual; LOIS DAVIS, an individual; DELL RAY
BARNEY, an individual; and DELL J BARNEY, an
Individual, dba Barney Towing & Recovery

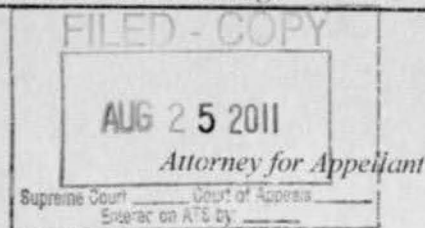
DEFENDANTS

*Appealed from the District Court of the Seventh Judicial
District of the State of Idaho, in and for Madison County*

Honorable Gregory W Moeller District Judge

Bryan D Smith
PO Box 50731
Idaho Falls, ID 83405

Thomas E Dyvorak
PO Box 2720
Boise, ID 83701-2720



Attorney for Respondent

Filed this the day of , 2011

38645

COPY

Clerk
Deputy

IN THE SUPREME COURT OF THE STATE OF IDAHO

KEYBANK NATIONAL ASSOCIATION)	
a national banking association)	
)	
PLAINTIFF-RESPONDENT)	
)	SUPREME Court NO. 38645-2011
VS)	
)	
PAL I. LLC, an Idaho Limited Liability Co.)	CASE NO. CV-2010-680
)	
DEFENDANT-APPELLANT)	
)	
and)	
)	
BRIAN CHRISTENSEN an individual; LA)	
PARKINSON, an individual; BARNEY)	
DAIRY, INC.; DJ BARNEY, an individual)	
WILLIAM DAVIS, an individual; LOIS)	
DAVIS, an individual; DELL RAY BARNEY))	
an individual; and DELL J BARNEY, an)	
individual, dba Barney Towing & Recovery)	
)	
DEFENDANTS)	
)	

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the 7th Judicial District of the State of Idaho, in and
for

THE
COUNTY OF MADISON
GREGORY W MOELLER

DISTRICT JUDGE

ATTORNEY
FOR APPELLANT
Bryan D Smith
PO Box 50731
Idaho Falls, ID 83405

ATTORNEY
FOR RESPONDENT
Thomas E Dvorak
PO Box 2720
Boise, ID 83701-2720

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Time: 10:03 AM

ROA Report

Case: CV-2010-0000680 Current Judge: Gregory W Moeller

Keybank National Association vs. PAL I, LLC, etal.

Date	Code	User	Judge
8/16/2010	NCOC	GWEN	New Case Filed - Other Claims Gregory W Moeller
		GWEN	Filing: A - All initial civil case filings of any type not listed in categories B-H, or the other A listings below Paid by: Dvorak, T E (attorney for Keybank National Association) Receipt number: 0027383 Dated: 8/17/2010 Amount: \$88.00 (Check) For: Keybank National Association (plaintiff) Gregory W Moeller
	APER	GWEN	Plaintiff: Keybank National Association Appearance T E Dvorak Gregory W Moeller
	SMIS	GWEN	Summons Issued Gregory W Moeller
	SMIS	GWEN	Summons Issued Gregory W Moeller
	SMIS	GWEN	Summons Issued Gregory W Moeller
	SMIS	GWEN	Summons Issued Gregory W Moeller
	SMIS	GWEN	Summons Issued Gregory W Moeller
	SMIS	GWEN	Summons Issued Gregory W Moeller
	SMIS	GWEN	Summons Issued Gregory W Moeller
8/17/2010	SMIS	GWEN	Summons Issued Gregory W Moeller
9/1/2010		GWEN	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Moffatt Thomas Receipt number: 0027674 Dated: 9/1/2010 Amount: \$11.00 (Check) Gregory W Moeller
9/2/2010	HRSC	ANGIE	Hearing Scheduled (Summary Judgment 11/01/2010 10:00 AM) Gregory W Moeller
9/13/2010	ACSR	GWEN	Acceptance Of Service Gregory W Moeller
9/27/2010		GWEN	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: BJ Driscoll Receipt number: 0028281 Dated: 9/27/2010 Amount: \$58.00 (Check) For: PAL I, LLC (defendant) Gregory W Moeller
	APER	GWEN	Defendant: PAL I, LLC Appearance B.J. Driscoll Gregory W Moeller
10/4/2010	MOTN	GWEN	Motion for Summary Judgment Gregory W Moeller
	BREF	GWEN	Brief in Support of Motion for Summary Judgment Gregory W Moeller
	AFFD	GWEN	Affidavit of Suzanne Bagley Gregory W Moeller
	AFFD	GWEN	Affidavit of BJ Driscoll Gregory W Moeller
	NOTH	GWEN	Notice Of Hearing Gregory W Moeller
10/5/2010	MEMO	GWEN	Plaintiff's Memorandum in Support of Motion for Partial Summary Judgment Against PAL I Gregory W Moeller
	AFFD	GWEN	Affidavit of Amber N Dina in Support of Plaintiff's Motion for Partial Sumamry Judgment Against PAL I Gregory W Moeller

Date	Code	User		Judge
10/5/2010	NOTH	GWEN	Notice Of Hearing	Gregory W Moeller
	MOTN	GWEN	Plaintiff's Motion for Partial Summary Judgment Against PAL I	Gregory W Moeller
	AFFD	GWEN	Affidavit of Jeff Hart	Gregory W Moeller
10/13/2010	AFFD	KRIS	Affidavit of Suzanne Bagley	Gregory W Moeller
10/18/2010		GWEN	Plaintiff's Opposition to PAL I LLC's Motion for Summary Judgment and memorandum in Opposition to Motion to strike	Gregory W Moeller
	MOTN	GWEN	Motion to Strike	Gregory W Moeller
	BREF	GWEN	Brief in Opposition to Plaintiff's Motion for Partial Sumamry Judgment against PAL I	Gregory W Moeller
	NOTH	GWEN	Notice Of Hearing	Gregory W Moeller
10/20/2010	AFFD	GWEN	Second Affidavit of Amber N Dina	Gregory W Moeller
	AFFD	GWEN	Second Affidavit of Jeff Hart	Gregory W Moeller
10/25/2010	BREF	GWEN	Reply Brief in Support of Plaintiff's Motion for Partial Sumamry Judgment against PAL I	Gregory W Moeller
11/1/2010	MINE	ANGIE	Minute Entry Hearing type: Summary Judgment Hearing date: 11/1/2010 Time: 10:06 am Courtroom: Brent J. Moss District Court Court reporter: Minutes Clerk: Angie Wood Tape Number: Party: Keybank National Association, Attorney: T Dvorak Party: PAL I, LLC, Attorney: B.J. Driscoll	Gregory W Moeller
12/23/2010	MEMO	GWEN	Memorandum Decision	Gregory W Moeller
1/3/2011	JDMT	GWEN	Judgment \$16,884.41	Gregory W Moeller
	HRSC	ANGIE	Hearing Scheduled (Motion 01/24/2011 10:00 AM)	Gregory W Moeller
	CDIS	GWEN	Civil Disposition entered for: PAL I, LLC, Defendant; Keybank National Association, Plaintiff. Filing date: 1/3/2011	Gregory W Moeller
		GWEN	Rule 54(b)	Gregory W Moeller
1/11/2011	MOTN	GWEN	Motion for Reconsideration	Gregory W Moeller
	BREF	GWEN	Brief in Support of Motion for Reconsideration	Gregory W Moeller
	NOTH	GWEN	Notice Of Hearing	Gregory W Moeller
1/18/2011		GWEN	Plaintiff's Opposisiton to PAL I LLC's Motion for Reconsideration	Gregory W Moeller
	AFFD	GWEN	Affidavit of Thomas E Dvorak in Support of Plaintiff's Application for Costs and Attorney's Fees	Gregory W Moeller
REGISTER OF ACTIONS PAGE 10		GWEN	Plaintiff's Verified Memorandum of Costs and Attorney's Fees	Gregory W Moeller

Date: 5/19/2011

Seventh Judicial District Court - Madison County

User: GWEN

Time: 10:03 AM

ROA Report

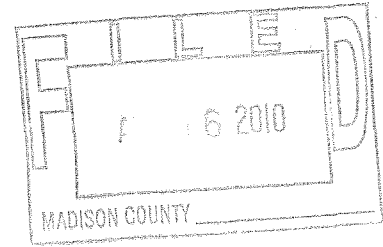
Case: CV-2010-0000680 Current Judge: Gregory W Moeller

Keybank National Association vs. PAL I, LLC, etal.

Date	Code	User		Judge
1/18/2011		GWEN	Plaintiff's Application for Costs and Attorney's fees	Gregory W Moeller
1/21/2011		GWEN	Reply Brief in Support of Motion for Reconsideration	Gregory W Moeller
1/24/2011	MINE	ANGIE	Minute Entry Hearing type: Motion Hearing date: 1/24/2011 Time: 11:35 am Courtroom: Brent J. Moss District Court Court reporter: David Marlow Minutes Clerk: Angie Wood Tape Number:	Gregory W Moeller
1/31/2011	OBJC	GWEN	Objection and Motion to Disallow Award of Costs and Attorney's fees	Gregory W Moeller
2/7/2011	NOTC	GWEN	Notice of Voluntary Dismissal without Prejudice	Gregory W Moeller
	STAT	GWEN	STATUS CHANGED: closed	Gregory W Moeller
	CDIS	GWEN	Civil Disposition entered for: Barney Dairy, INC, Defendant; Barney, Dell J, Defendant; Barney, Dell Ray, Defendant; Barney, DJ, Defendant; Christensen, Brian, Defendant; Davis, Lois, Defendant; Davis, William, Defendant; Parkinson, LA, Defendant; Keybank National Association, Plaintiff. Filing date: 2/8/2011	Gregory W Moeller
2/25/2011	MEMO	GWEN	Memorandum Decision of Reconsideration	Gregory W Moeller
3/4/2011	BREF	CHANTELLE	Brief in Support of Objection ans Motion to Disallow Award of Costs and Attorney's Fees	Gregory W Moeller
3/11/2011	RPLY	GWEN	Reply in Support of Plaintiff's Application for Costs and Attorney's fees and Opposition to Motion to Disallow	Gregory W Moeller
3/17/2011		GWEN	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Driscoll, B.J. (attorney for PAL I, LLC) Receipt number: 0001659 Dated: 3/17/2011 Amount: \$101.00 (Check) For: PAL I, LLC (defendant)	Gregory W Moeller
		GWEN	Miscellaneous Payment: For Making Copies Of Transcripts For Appeal Per Page Paid by: Smith Driscoll Receipt number: 0001660 Dated: 3/17/2011 Amount: \$200.00 (Check)	Gregory W Moeller
4/19/2011	AFFD	GWEN	Affidavit of Amount Due on Writ of Execution	Gregory W Moeller
	WRIT	GWEN	Writ Issued	Gregory W Moeller
		GWEN	Miscellaneous Payment: Writs Of Execution Paid by: Givens Pursley Receipt number: 0002456 Dated: 4/20/2011 Amount: \$2.00 (Check)	Gregory W Moeller
5/16/2011	AFFD	GWEN	Affidavit of Amount Due on Writ of Execution	Gregory W Moeller
	WRIT	GWEN	Writ Issued (Bonneville County)	Gregory W Moeller

ORIGINAL

Thomas E. Dvorak (ID State Bar ID# 5043)
Amber N. Dina (ID State Bar ID# 7708)
GIVENS PURSLEY LLP
601 West Bannock Street
Post Office Box 2720
Boise, Idaho 83701-2720
Telephone: 208-388-1200
Facsimile: 208-388-1300
934076_3



Attorneys for KeyBank National Association

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT FOR THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION, a
national banking association,

Plaintiff,

v.

PAL I, LLC, an Idaho limited liability
company; BRIAN CHRISTENSEN, an
individual; L.A. PARKINSON, an individual;
BARNEY DAIRY, INC.; D.J. BARNEY, an
individual; WILLIAM DAVIS, an individual;
LOIS DAVIS, an individual; DELL RAY
BARNEY, an individual; and DELL J.
BARNEY, an individual, dba Barney Towing
& Recovery,

Defendants.

Case No.

CV10-680

**COMPLAINT FOR QUIET TITLE
OR ALTERNATIVELY FOR
CREDITOR'S BILL**

COMES NOW, KeyBank National Association, a national banking association, by and through its counsel of record, Givens Pursley LLP, and for causes of action against the above-named Defendants, pleads, alleges and avers as follows:

PARTIES

1. Plaintiff KeyBank National Association, a KeyCorp Bank ("KeyBank") is a national banking association doing business in the state of Idaho.
2. Defendant PAL I, LLC ("PAL I") is an Idaho limited liability company.
3. Defendant Brian Christensen ("Christensen") is an individual who is believed to reside in Madison County, Idaho.
4. Defendant L.A. Parkinson ("Parkinson") is an individual who is believed to reside in Madison County, Idaho.
5. Defendant Barney Dairy, Inc. ("Barney Dairy") is an Idaho corporation.
6. Defendant D.J. Barney ("D.J. Barney") is an individual who is believed to reside in Madison County, Idaho.
7. Defendant William David ("W. Davis") is an individual who is believed to reside in Madison County, Idaho.
8. Defendant Lois Davis ("L. Davis") is an individual who is believed to reside in Madison County, Idaho.
9. Defendant Dell Ray Barney ("Dell R. Barney") is an individual who is believed to reside in Madison County, Idaho.
10. Defendant Dell J. Barney, doing business as Barney Towing and Recovery ("Dell J. Barney"), is an individual who is believed to reside in Madison County, Idaho.

JURISDICTION AND VENUE

11. Jurisdiction and venue are proper before this Court. The amount in controversy exceeds in value \$10,000.00.

COMMON ALLEGATIONS

2007 Loan

12. On or about April 16, 2007, KeyBank did loan to Tri-Steel Construction Company, Inc. ("Tri-Steel") the amount of \$150,000. Said loan is identified by KeyBank in its internal records as the 2382555007 loan (the "2007 Loan").

13. As security for the 2007 Loan, Tri-Steel executed a certain commercial security agreement on April 16, 2007 (the "2007 Commercial Security Agreement"), a true and correct copy of which is attached hereto as Exhibit A.

14. Pursuant to the 2007 Commercial Security Agreement, the following was pledged as collateral:

All inventory, equipment, accounts (including but not limited to all health-care insurance receivables), chattel paper, instruments (including but not limited to all promissory notes), letter-of-credit rights, letters of credit, documents, deposit accounts, investment property, money, other rights to payment and performance, and general intangibles (including but not limited to all software and all payment intangibles); all oil, gas and other minerals before extraction; all oil, gas, other minerals and accounts constituting as-extracted collateral; all fixtures; all timber to be cut; all attachments, accessions, accessories, fittings, increases, tools, parts, repairs, supplies, and commingled goods relating to the foregoing property, and all additions, replacements of and substitutions for all or any part of the foregoing property; all insurance refunds relating to the foregoing property; all good will relating to the foregoing property; all records and data and embedded software relating to the foregoing property, and all equipment, inventory and software to utilize create, maintain and process any such records and data on electronic media; and all supporting obligations relating to the foregoing property; all whether now existing or hereafter arising, whether now owned or hereafter acquired or whether now or hereafter subject to any rights in the foregoing property; and all products and proceeds (including but not limited to all insurance payments) of or relating to the foregoing property.

(the "2007 Collateral").

15. On April 23, 2007, KeyBank did file a UCC Financing Statement with the Idaho Secretary of State perfecting its interest in the 2007 Collateral as Filing No. B2007-1024332-4 (the "2007 Financing Statement"). A true and correct copy of the 2007 Financing Statement is attached hereto as Exhibit B.

2008 Loan

16. On or about December 5, 2008, KeyBank did enter into a Business Loan Agreement and did loan pursuant to said agreement the amount of \$150,000 to Tri-Steel (the "2008 Loan").

17. In connection with the 2008 Loan, Tri-Steel executed a certain commercial security agreement on or about December 5, 2008 (the "2008 Commercial Security Agreement"), a true and correct copy of which is attached hereto as Exhibit C.

18. The description of collateral for the 2008 Commercial Security Agreement was substantially the same as the description of collateral in the 2007 Commercial Security Agreement (the "2008 Collateral").

19. On February 23, 2010, KeyBank did file a UCC Financing Statement with the Idaho Secretary of State perfecting its interest in the 2008 Collateral as Filing No. B 2010-1075267-4 (the "2008 Financing Statement"). A true and correct copy of the 2008 Financing Statement is attached hereto as Exhibit D.

Tri-Steel Judgment

20. KeyBank brought suit against Tri-Steel in District Court of the Seventh Judicial District for the State of Idaho in and for the County of Madison, as Case No. CV-10-191 (the "Original Lawsuit") for breach of the 2007 and 2008 Loans.

21. In April, 2010, KeyBank learned that Defendant PAL I had caused the Madison

County Sheriff to serve a writ execution and notice of attachment against certain property belonging to Tri-Steel.

22. On April 28, 2010, KeyBank's counsel sent PAL I's counsel a letter stating that the property PAL I sought to seize was KeyBank's secured collateral (the "KeyBank Collateral"). KeyBank informed PAL I that it had no right to seize or sell the KeyBank Collateral, and that if any sale of such property occurred, KeyBank would retain all rights it had in the KeyBank Collateral, including a right to the proceeds from the sale. A true and correct copy of the April 28, 2010 letter is attached hereto as Exhibit E.

23. KeyBank subsequently learned that the Madison County Sheriff's Office had scheduled an auction of the KeyBank Collateral on June 9, 2010 (the "Auction").

24. The Original Lawsuit was reduced to a default judgment on June 1, 2010, in the amount of \$296,500.10 plus interest on the same at the statutory rate of 5.625% annually from and after the date of judgment, plus attorneys' fees in the amount of \$9,349.05 (the "Judgment"). A true and correct copy of the Judgment is attached hereto as Exhibit F.

25. The Judgment also provided that KeyBank was entitled to a writ of possession against Tri-Steel directing the Sheriff to put KeyBank in possession of the 2007 Collateral and the 2008 Collateral and authorizing KeyBank, upon its receipt of said collateral, to utilize its non-judicial remedies under the Uniform Commercial Code.

26. The Judgment has not been satisfied.

27. On or about June 4, 2010, KeyBank sent the Madison County Sheriff's Office a writ of execution for the KeyBank Collateral and instructed the Sheriff to seize the KeyBank Collateral.

28. Following unproductive telephone conversations with the Madison County

Sheriff's Office, on June 8, 2010, KeyBank sent the Sheriff's Office amended instructions to its writ, which stated in part:

As we discussed today, and pursuant to the enclosed Security Agreement and UCC filing, KeyBank has a perfected security interest the personal property of Tri-Steel Construction Company that is scheduled for sale on June 9, 2010 at 10:00 a.m. Notably, KeyBank also has a perfected security interest in all proceeds from the sale of the property. See Security Agreement, p. 1, Collateral Description (D) ("All proceeds . . . from the sale, destruction, loss or other disposition of any of the property described in this Collateral section . . .").

Therefore, KeyBank requests that you postpone the sale for one week until the creditors have time to obtain a court order regarding the distribution of proceeds. If you choose to proceed with the sale, please hold all the sale proceeds in a trust account until you receive a court order instructing their distribution.

A true and correct copy of the amended instructions to the Sheriff are attached hereto as Exhibit G.

29. On June 8, 2010, KeyBank also sent PAL I's counsel a letter, stating in part:

KeyBank requests that you postpone the sale until we can obtain a court order regarding the priority of our interests in the property. If you choose to proceed with the sale, please instruct the Sheriff's office to hold all the sale proceeds in a trust account, so we can then litigate over their distribution. If you proceed with the sale and fail to retain the proceeds in a trust account, KeyBank will hold PAL I fully responsible for its lost collateral and proceeds.

A true and correct copy of the June 8, 2010 letter to PAL I is attached hereto as Exhibit H.

30. PAL I did not instruct the Sheriff to postpone the sale or hold the sale proceeds in a trust account as requested by KeyBank.

31. On June 9, 2010, counsel for KeyBank spoke with Troy Evans, the Madison County Prosecutor in charge of civil matters. Mr. Evans stated that he had advised the Madison County Sheriff's Office to postpone the sale for at least a week to allow the competing creditors to resolve their issues. Mr. Evans also advised the Sheriff's Office that should they proceed with

the Auction, they should advise potential purchasers that they will be buying heavily liened property.

32. Despite Mr. Evan's counsel, the Madison County Sheriff's Office refused to postpone the Auction or hold the sale proceeds in trust.

33. On June 9, 2010, upon learning the Auction had proceeded as scheduled, KeyBank's counsel sent a letter to the Madison County Sheriff's Office, which stated:

It is my understanding that the sale went forward today as scheduled despite KeyBank's objections. Please provide me with detailed accounting of the sale that includes a list of each item that was sold, the name and address of the purchaser and the price the purchaser paid for the item.

A true and correct copy of the June 9, 2010 letter to the Madison County Sheriff's Office is attached hereto as Exhibit I.

34. To date, the Madison County Sheriff's Office has failed to provide KeyBank with (a) any accounting of the Auction or (b) any proof of service or other documentation regarding KeyBank's June 1, 2010 writ of execution. KeyBank therefore has no adequate remedy at law.

35. In response to a request from KeyBank's counsel, on June 29, 2010, counsel for PAL I provided a copy of the accounting it received from the Madison County Sheriff's Office (the "Sheriff's Accounting"). A true and correct copy of the Sheriff's Accounting is attached hereto as Exhibit J.

36. Page 2 of the Sheriff's Accounting states that \$16,884.41 was disbursed to counsel for PAL I (the "Sale Proceeds").

COUNT 1
Quiet Title and Declaratory Judgment
(Against PAL I, LLC)

37. The foregoing paragraphs are incorporated herein by this reference as if set forth in full.

38. Idaho Code Section 6-101 provides, in pertinent part: “[a]n action may be brought by any person against another who claims an estate or interest in real or personal property adverse to him, for the purpose of determining such adverse claim.”

39. The KeyBank Collateral is personal property within the meaning of Section 6-101.

40. As a secured creditor with priority over PAL I, a mere unsecured judgment creditor of Tri-Steel, KeyBank has a legal right to all resulting proceeds from the Auction of the KeyBank Collateral.

41. PAL I claims an interest in said proceeds adverse to Key Bank.

42. Plaintiff is entitled to a judgment of this Court decreeing and declaring that said KeyBank Collateral is subject to the security interest of Plaintiff, Plaintiff is entitled to the execution of the same pursuant to the Judgment, and the KeyBank Collateral is not subject to any claim by PAL I.

43. Plaintiff further requests the Court order Defendant PAL I to pay over to KeyBank all Sale Proceeds that it received from the June 9, 2010 Auction.

COUNT 2
Quiet Title and Declaratory Judgment
(Against Buyer Defendants)

44. The foregoing paragraphs are incorporated herein by this reference as if set forth in full.

45. Count 2 is plead in the alternative to Count 1.

46. Upon information and belief Defendants Christensen, Parkinson, Barney Dairy, D.J. Barney, W. Davis, L. Davis, Dell R. Barney, and Dell J. Barney (collectively, the “Buyer Defendants”) purchased certain items of the KeyBank Collateral at the Auction on June 9, 2010.

47. Idaho Code Section 6-101 provides, in pertinent part: “[a]n action may be brought by any person against another who claims an estate or interest in real or personal property adverse to him, for the purpose of determining such adverse claim.”

48. The KeyBank Collateral is personal property within the meaning of Section 6-101.

49. As a secured creditor in the KeyBank Collateral, KeyBank has a legal right to possession of the Collateral.

50. Plaintiff is entitled to a judgment of this Court decreeing and declaring that said KeyBank Collateral is subject to the security interest of Plaintiff, Plaintiff is entitled to the execution of the same pursuant to the Judgment, and the KeyBank Collateral is not subject to any claim by the Buyer Defendants.

51. Plaintiff further requests the Court order the Buyer Defendants to give KeyBank possession of the KeyBank Collateral they purchased at the July 9, 2010 Auction or, if they have sold the KeyBank Collateral, pay to KeyBank any proceeds they have received.

COUNT 3
Creditor’s Bill
(Against PAL I, LLC)

52. The foregoing paragraphs are incorporated herein by this reference as if set forth in full.

53. Count 3 is plead in the alternative to Counts 1 and 2 and only in the event that the Court determines the relief sought in those Counts is not appropriate.

54. Due to the failure of the Sheriff to follow the instructions of KeyBank, and the absence of another procedure to vindicate KeyBank’s title and right to the KeyBank Collateral, KeyBank is without an adequate remedy at law, thereby justifying invoking the equity

jurisdiction of this court for a creditor's bill.

55. As a secured creditor with priority over PAL I, a mere unsecured judgment creditor of Tri-Steel, KeyBank has a legal right to all resulting proceeds from the Auction of the KeyBank Collateral.

56. Plaintiff therefore requests the Court order Defendant PAL I to pay over to KeyBank all Sale Proceeds that it received from the June 9, 2010 Auction.

COUNT 4
Creditor's Bill
(Against Buyer Defendants)

57. The foregoing paragraphs are incorporated herein by this reference as if set forth in full.

58. Count 4 is plead in the alternative to Counts 1, 2 and 3 and only in the event that the Court determines the relief sought in those Counts is not appropriate.

59. Upon information and belief Defendants Christensen, Parkinson, Barney Dairy, D.J. Barney, W. Davis, L. Davis, Dell R. Barney, and Dell J. Barney (collectively, the "Buyer Defendants") purchased certain items of the KeyBank Collateral at the Auction on June 9, 2010.

60. As a secured creditor in the KeyBank Collateral, KeyBank has a legal right to possession of the Collateral.

61. Plaintiff therefore requests the Court order the Buyer Defendants to give KeyBank possession of the KeyBank Collateral they purchased at the July 9, 2010 Auction or, if they have sold the KeyBank Collateral, pay to KeyBank any proceeds they have received.

ATTORNEYS' FEES

In order to vindicate its rights, KeyBank has been forced to retain counsel. KeyBank is entitled to an award of its reasonable costs and attorneys fees incurred in this matter pursuant to

Idaho Code Section 12-120 and the agreement(s) between KeyBank and its debtor.

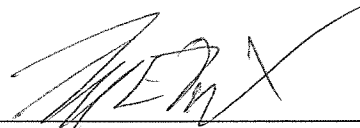
PRAYER FOR RELIEF

WHEREFORE, Plaintiff KeyBank National Association prays for the following relief from this Court:

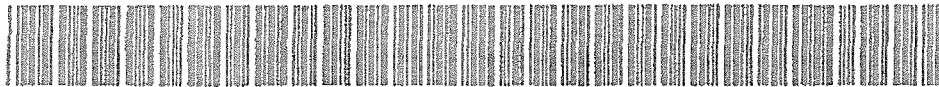
1. For judgment in its favor on all counts in the Complaint;
2. For the specific relief sought in each of the above-said counts;
3. For an order awarding KeyBank its reasonable costs and attorneys' fees on the basis set forth above in the amount of \$5,000.00 in the event of a default judgment, or in such other and further amounts as may be proven at the appropriate time in the proceedings; and
4. For such other and further relief as the Court may deem appropriate in the premises.

DATED this 12th day of August, 2010.

GIVENS PURSLEY, LLP



Thomas E. Dvorak
Attorneys for KeyBank National Association



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COMMERCIAL SECURITY AGREEMENT

Principal	Loan Date	Maturity	Loan No	Collateral	Account	Officer	Initials
\$150,000.00	04-16-2007	04-16-2014	2552555007	4024326	N5602420491	JH28	

References in the shaded area are for Lender's use only and do not limit the applicability of this document to any particular loan or item. Any item above containing "..." has been omitted due to text length limitations.

Grantor: Tri-Steel Construction Company, Inc.
1305 S 12th W
Rexburg, ID 83440

Lender: KeyBank National Association
ID-88-Rexburg
110 E. Main Street
Rexburg, ID 83440

THIS COMMERCIAL SECURITY AGREEMENT dated April 16, 2007, is made and executed between Tri-Steel Construction Company, Inc. ("Grantor") and KeyBank National Association ("Lender").

GRANT OF SECURITY INTEREST. For valuable consideration, Grantor grants to Lender a security interest in the Collateral to secure the indebtedness and agrees that Lender shall have the rights stated in this Agreement with respect to the Collateral, in addition to all other rights which Lender may have by law.

COLLATERAL DESCRIPTION The word "Collateral" as used in this Agreement means the following described property, whether now owned or hereafter acquired, whether now existing or hereafter arising, and wherever located, in which Grantor is giving to Lender a security interest for the payment of the indebtedness and performance of all other obligations under the Note and this Agreement:

All inventory, equipment, accounts (including but not limited to all health-care-insurance receivables), chattel paper, instruments (including but not limited to all promissory notes), letter-of-credit rights, letters of credit, documents, deposit accounts, investment property, money, other rights to payment and performance, and general intangibles (including but not limited to all software and all payment intangibles); all oil, gas and other minerals before extraction; all oil, gas, other minerals and accounts constituting as-extracted collateral; all fixtures; all timber to be cut; all attachments, accessions, accessories, fittings, increases, tools, parts, repairs, supplies, and commingled goods relating to the foregoing property, and all additions, replacements of and substitutions for all or any part of the foregoing property; all insurance refunds relating to the foregoing property; all good will relating to the foregoing property; all records and data and embedded software relating to the foregoing property, and all equipment, inventory and software to utilize, create, maintain and process any such records and data on electronic media; and all supporting obligations relating to the foregoing property; all whether now existing or hereafter arising, whether now owned or hereafter acquired or whether now or hereafter subject to any rights in the foregoing property; and all products and proceeds (including but not limited to all insurance payments) of or relating to the foregoing property.

In addition, the word "Collateral" also includes all the following, whether now owned or hereafter acquired, whether now existing or hereafter arising, and wherever located:

- (A) All accessions, attachments, accessories, tools, parts, supplies, replacements of and additions to any of the collateral described herein, whether added now or later
- (B) All products and produce of any of the property described in this Collateral section.
- (C) All accounts, general intangibles, instruments, rents, monies, payments, and all other rights, arising out of a sale, lease, consignment or other disposition of any of the property described in this Collateral section
- (D) All proceeds (including insurance proceeds) from the sale, destruction, loss, or other disposition of any of the property described in this Collateral section, and sums due from a third party who has damaged or destroyed the Collateral or from that party's insurer, whether due to judgment, settlement or other process.
- (E) All records and data relating to any of the property described in this Collateral section, whether in the form of a writing, photograph, microfilm, microfiche, or electronic media, together with all of Grantor's right, title, and interest in and to all computer software required to utilize, create, maintain, and process any such records or data on electronic media

CROSS-COLLATERALIZATION. In addition to the Note, this Agreement secures all obligations, debts and liabilities, plus interest thereon, of Grantor to Lender, or any one or more of them, as well as all claims by Lender against Grantor or any one or more of them, whether now existing or hereafter arising, whether related or unrelated to the purpose of the Note, whether voluntary or otherwise, whether due or not due, direct or indirect, determined or undetermined, absolute or contingent, liquidated or unliquidated, whether Grantor may be liable individually or jointly with others, whether obligated as guarantor, surety, accommodation party or otherwise, and whether recovery upon such amounts may be or hereafter may become barred by any statute of limitations, and whether the obligation to repay such amounts may be or hereafter may become otherwise unenforceable.

RIGHT OF SETOFF. To the extent permitted by applicable law, Lender reserves a right of setoff in all Grantor's accounts with Lender (whether checking, savings, or some other account). This includes all accounts Grantor holds jointly with someone else and all accounts Grantor may open in the future. However, this does not include any IRA or Keogh accounts, or any trust accounts for which setoff would be prohibited by law. Grantor authorizes Lender, to the extent permitted by applicable law, to charge or setoff all sums owing on the indebtedness against any and all such accounts.

GRANTOR'S REPRESENTATIONS AND WARRANTIES WITH RESPECT TO THE COLLATERAL. With respect to the Collateral, Grantor represents and promises to Lender that:

Perfection of Security Interest. Grantor agrees to take whatever actions are requested by Lender to perfect and continue Lender's security interest in the Collateral. Upon request of Lender, Grantor will deliver to Lender any and all of the documents evidencing or constituting the Collateral, and Grantor will note Lender's interest upon any and all chattel paper and instruments if not delivered to Lender for possession by Lender. This is a continuing Security Agreement and will continue in effect even though all or any part of the indebtedness is paid in full and even though for a period of time Grantor may not be indebted to Lender.

Notices to Lender. Grantor will promptly notify Lender in writing at Lender's address shown above (or such other addresses as Lender may designate from time to time) prior to any: (1) change in Grantor's name; (2) change in Grantor's assumed business name(s); (3) change

COMMERCIAL SECURITY AGREEMENT (Continued)

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In the management of the Corporation Grantor, (4) change in the authorized signer(s), (5) change in Grantor's principal office address; (6) change in Grantor's state of organization, (7) conversion of Grantor to a new or different type of business entity; or (8) change in any other aspect of Grantor that directly or indirectly relates to any agreements between Grantor and Lender. No change in Grantor's name or state of organization will take effect until after Lender has received notice.

No Violation. The execution and delivery of this Agreement will not violate any law or agreement governing Grantor or to which Grantor is a party, and its certificate or articles of incorporation and bylaws do not prohibit any term or condition of this Agreement.

Enforceability of Collateral. To the extent the Collateral consists of accounts, chattel paper, or general intangibles, as defined by the Uniform Commercial Code, the Collateral is enforceable in accordance with its terms, is genuine, and fully complies with all applicable laws and regulations concerning form, content and manner of preparation and execution, and all persons appearing to be obligated on the Collateral have authority and capacity to contract and are in fact obligated as they appear to be on the Collateral. At the time any account becomes subject to a security interest in favor of Lender, the account shall be a good and valid account representing an undisputed, bona fide indebtedness incurred by the account debtor, for merchandise held subject to delivery instructions or previously shipped or delivered pursuant to a contract of sale, or for services previously performed by Grantor with or for the account debtor. So long as this Agreement remains in effect, Grantor shall not, without Lender's prior written consent, compromise, settle, adjust, or extend payment under or with regard to any such Accounts. There shall be no setoffs or counterclaims against any of the Collateral, and no agreement shall have been made under which any deductions or discounts may be claimed concerning the Collateral except those disclosed to Lender in writing.

Location of the Collateral. Except in the ordinary course of Grantor's business, Grantor agrees to keep the Collateral (or to the extent the Collateral consists of intangible property such as accounts or general intangibles, the records concerning the Collateral) at Grantor's address shown above or at such other locations as are acceptable to Lender. Upon Lender's request, Grantor will deliver to Lender in form satisfactory to Lender a schedule of real properties and Collateral locations relating to Grantor's operations, including without limitation the following: (1) all real property Grantor owns or is purchasing, (2) all real property Grantor is renting or leasing, (3) all storage facilities Grantor owns, rents, leases, or uses, and (4) all other properties where Collateral is or may be located.

Removal of the Collateral. Except in the ordinary course of Grantor's business, including the sales of inventory, Grantor shall not remove the Collateral from its existing location without Lender's prior written consent. To the extent that the Collateral consists of vehicles, or other titled property, Grantor shall not take or permit any action which would require application for certificates of title for the vehicles outside the State of Idaho, without Lender's prior written consent. Grantor shall, whenever requested, advise Lender of the exact location of the Collateral.

Transactions Involving Collateral. Except for inventory sold or accounts collected in the ordinary course of Grantor's business, or as otherwise provided for in this Agreement, Grantor shall not sell, offer to sell, or otherwise transfer or dispose of the Collateral. While Grantor is not in default under this Agreement, Grantor may sell inventory, but only in the ordinary course of its business and only to buyers who qualify as a buyer in the ordinary course of business. A sale in the ordinary course of Grantor's business does not include a transfer in partial or total satisfaction of a debt or any bulk sale. Grantor shall not pledge, mortgage, encumber or otherwise permit the Collateral to be subject to any lien, security interest, encumbrance, or charge, other than the security interest provided for in this Agreement, without the prior written consent of Lender. This includes security interests even if junior in right to the security interests granted under this Agreement. Unless waived by Lender, all proceeds from any disposition of the Collateral (for whatever reason) shall be held in trust for Lender and shall not be commingled with any other funds; provided however, this requirement shall not constitute consent by Lender to any sale or other disposition. Upon receipt, Grantor shall immediately deliver any such proceeds to Lender.

Title. Grantor represents and warrants to Lender that Grantor holds good and marketable title to the Collateral, free and clear of all liens and encumbrances except for the lien of this Agreement. No financing statement covering any of the Collateral is on file in any public office other than those which reflect the security interest created by this Agreement or to which Lender has specifically consented. Grantor shall defend Lender's rights in the Collateral against the claims and demands of all other persons.

Repairs and Maintenance. Grantor agrees to keep and maintain, and to cause others to keep and maintain, the Collateral in good order, repair and condition at all times while this Agreement remains in effect. Grantor further agrees to pay when due all claims for work done on, or services rendered or material furnished in connection with the Collateral so that no lien or encumbrance may ever attach to or be filed against the Collateral.

Inspection of Collateral. Lender and Lender's designated representatives and agents shall have the right at all reasonable times to examine and inspect the Collateral wherever located.

Taxes, Assessments and Liens. Grantor will pay when due all taxes, assessments and liens upon the Collateral, its use or operation, upon this Agreement, upon any promissory note or notes evidencing the indebtedness, or upon any of the other Related Documents. Grantor may withhold any such payment or may elect to contest any lien if Grantor is in good faith conducting an appropriate proceeding to contest the obligation to pay and so long as Lender's interest in the Collateral is not jeopardized in Lender's sole opinion. If the Collateral is subjected to a lien which is not discharged within fifteen (15) days, Grantor shall deposit with Lender cash, a sufficient corporate surety bond or other security satisfactory to Lender in an amount adequate to provide for the discharge of the lien plus any interest, costs, reasonable attorneys' fees or other charges that could accrue as a result of foreclosure or sale of the Collateral. In any contest Grantor shall defend itself and Lender and shall satisfy any final adverse judgment before enforcement against the Collateral. Grantor shall name Lender as an additional obligee under any surety bond furnished in the contest proceedings. Grantor further agrees to furnish Lender with evidence that such taxes, assessments, and governmental and other charges have been paid in full and in a timely manner. Grantor may withhold any such payment or may elect to contest any lien if Grantor is in good faith conducting an appropriate proceeding to contest the obligation to pay and so long as Lender's interest in the Collateral is not jeopardized.

Compliance with Governmental Requirements. Grantor shall comply promptly with all laws, ordinances, rules and regulations of all governmental authorities, now or hereafter in effect, applicable to the ownership, production, disposition, or use of the Collateral, including all laws or regulations relating to the undue erosion of highly-erodible land or relating to the conversion of wetlands for the production of an agricultural product or commodity. Grantor may contest in good faith any such law, ordinance or regulation and withhold compliance during any proceeding, including appropriate appeals, so long as Lender's interest in the Collateral, in Lender's opinion, is not jeopardized.

Hazardous Substances. Grantor represents and warrants that the Collateral never has been, and never will be so long as this Agreement remains a lien on the Collateral, used in violation of any Environmental Laws or for the generation, manufacture, storage, transportation, treatment, disposal, release or threatened release of any Hazardous Substance. The representations and warranties contained herein are based on Grantor's due diligence in investigating the Collateral for Hazardous Substances. Grantor hereby (1) releases and waives any future claims against Lender for indemnity or contribution in the event Grantor becomes liable for cleanup or other costs under any Environmental Laws, and (2) agrees to indemnify, defend, and hold harmless Lender against any and all claims and losses resulting from a breach of this provision of this Agreement. This obligation to indemnify and defend shall survive the payment of the indebtedness and the satisfaction of this Agreement.

COMMERCIAL SECURITY AGREEMENT (Continued)

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Maintenance of Casualty Insurance. Grantor shall procure and maintain all risks insurance, including without limitation fire, theft and liability coverage together with such other insurance as Lender may require with respect to the Collateral, in form, amounts, coverages and basis reasonably acceptable to Lender and issued by a company or companies reasonably acceptable to Lender. Grantor, upon request of Lender, will deliver to Lender from time to time the policies or certificates of insurance in form satisfactory to Lender, including stipulations that coverages will not be cancelled or diminished without at least ten (10) days' prior written notice to Lender and not including any disclaimer of the insurer's liability for failure to give such a notice. Each insurance policy also shall include an endorsement providing that coverage in favor of Lender will not be impaired in any way by any act, omission or default of Grantor or any other person. In connection with all policies covering assets in which Lender holds or is offered a security interest, Grantor will provide Lender with such loss payable or other endorsements as Lender may require. If Grantor at any time fails to obtain or maintain any insurance as required under this Agreement, Lender may (but shall not be obligated to) obtain such insurance as Lender deems appropriate, including if Lender so chooses "single interest insurance," which will cover only Lender's interest in the Collateral.

Application of Insurance Proceeds. Grantor shall promptly notify Lender of any loss or damage to the Collateral if the estimated cost of repair or replacement exceeds \$500.00, whether or not such casualty or loss is covered by insurance. Lender may make proof of loss if Grantor fails to do so within fifteen (15) days of the casualty. All proceeds of any insurance on the Collateral, including accrued proceeds thereon, shall be held by Lender as part of the Collateral. If Lender consents to repair or replacement of the damaged or destroyed Collateral, Lender shall, upon satisfactory proof of expenditure, pay or reimburse Grantor from the proceeds for the reasonable cost of repair or restoration. If Lender does not consent to repair or replacement of the Collateral, Lender shall retain a sufficient amount of the proceeds to pay all of the indebtedness, and shall pay the balance to Grantor. Any proceeds which have not been disbursed within six (6) months after their receipt and which Grantor has not committed to the repair or restoration of the Collateral shall be used to prepay the indebtedness.

Insurance Reserves. Lender may require Grantor to maintain with Lender reserves for payment of insurance premiums, which reserves shall be created by monthly payments from Grantor of a sum estimated by Lender to be sufficient to produce, at least fifteen (15) days before the premium due date, amounts at least equal to the insurance premiums to be paid. If fifteen (15) days before payment is due, the reserve funds are insufficient, Grantor shall upon demand pay any deficiency to Lender. The reserve funds shall be held by Lender as a general deposit and shall constitute a non-interest-bearing account which Lender may satisfy by payment of the insurance premiums required to be paid by Grantor as they become due. Lender does not hold the reserve funds in trust for Grantor, and Lender is not the agent of Grantor for payment of the insurance premiums required to be paid by Grantor. The responsibility for the payment of premiums shall remain Grantor's sole responsibility.

Insurance Reports. Grantor, upon request of Lender, shall furnish to Lender reports on each existing policy of insurance showing such information as Lender may reasonably request including the following: (1) the name of the insurer; (2) the risks insured; (3) the amount of the policy; (4) the property insured; (5) the then current value on the basis of which insurance has been obtained and the manner of determining that value; and (6) the expiration date of the policy. In addition, Grantor shall upon request by Lender (however not more often than annually) have an independent appraiser satisfactory to Lender determine, as applicable, the cash value or replacement cost of the Collateral.

Financing Statements. Grantor authorizes Lender to file a UCC financing statement, or alternatively, a copy of this Agreement to perfect Lender's security interest. At Lender's request, Grantor additionally agrees to sign all other documents that are necessary to perfect, protect, and continue Lender's security interest in the Property. Grantor will pay all filing fees, title transfer fees, and other fees and costs involved unless prohibited by law or unless Lender is required by law to pay such fees and costs. Grantor irrevocably appoints Lender to execute documents necessary to transfer title if there is a default. Lender may file a copy of this Agreement as a financing statement. If Grantor changes Grantor's name or address, or the name or address of any person granting a security interest under this Agreement changes, Grantor will promptly notify the Lender of such change.

GRANTOR'S RIGHT TO POSSESSION AND TO COLLECT ACCOUNTS. Until default and except as otherwise provided below with respect to accounts, Grantor may have possession of the tangible personal property and beneficial use of all the Collateral and may use it in any lawful manner not inconsistent with this Agreement or the Related Documents, provided that Grantor's right to possession and beneficial use shall not apply to any Collateral where possession of the Collateral by Lender is required by law to perfect Lender's security interest in such Collateral. Until otherwise notified by Lender, Grantor may collect any of the Collateral consisting of accounts. At any time and even though no Event of Default exists, Lender may exercise its rights to collect the accounts and to notify account debtors to make payments directly to Lender for application to the indebtedness. If Lender at any time has possession of any Collateral, whether before or after an Event of Default, Lender shall be deemed to have exercised reasonable care in the custody and preservation of the Collateral if Lender takes such action for that purpose as Grantor shall request or as Lender, in Lender's sole discretion, shall deem appropriate under the circumstances, but failure to honor any request by Grantor shall not of itself be deemed to be a failure to exercise reasonable care. Lender shall not be required to take any steps necessary to preserve any rights in the Collateral against prior parties, nor to protect, preserve or maintain any security interest given to secure the indebtedness.

LENDER'S EXPENDITURES. If any action or proceeding is commenced that would materially affect Lender's interest in the Collateral or if Grantor fails to comply with any provision of this Agreement or any Related Documents, including but not limited to Grantor's failure to discharge or pay when due any amounts Grantor is required to discharge or pay under this Agreement or any Related Documents, Lender on Grantor's behalf may (but shall not be obligated to) take any action that Lender deems appropriate, including but not limited to discharging or paying all taxes, liens, security interests, encumbrances and other claims, at any time levied or placed on the Collateral and paying all costs for insuring, maintaining and preserving the Collateral. All such expenditures incurred or paid by Lender for such purposes will then bear interest at the rate charged under the Note from the date incurred or paid by Lender to the date of repayment by Grantor. All such expenses will become a part of the indebtedness and, at Lender's option, will (A) be payable on demand; (B) be added to the balance of the Note and be apportioned among and be payable with any installment payments to become due during either (1) the term of any applicable insurance policy; or (2) the remaining term of the Note; or (C) be treated as a balloon payment which will be due and payable at the Note's maturity. The Agreement also will secure payment of these amounts. Such right shall be in addition to all other rights and remedies to which Lender may be entitled upon Default.

DEFAULT. Each of the following shall constitute an Event of Default under this Agreement:

Payment Default. Grantor fails to make any payment when due under the indebtedness.

Other Defaults. Grantor fails to comply with or to perform any other term, obligation, covenant or condition contained in this Agreement or in any of the Related Documents or to comply with or to perform any term, obligation, covenant or condition contained in any other agreement between Lender and Grantor.

Default in Favor of Third Parties. Should Borrower or any Grantor default under any loan, extension of credit, security agreement, purchase or sales agreement, or any other agreement, in favor of any other creditor or person that may materially affect any of Grantor's property or Grantor's or any Grantor's ability to repay the indebtedness or perform their respective obligations under this Agreement or any of the

COMMERCIAL SECURITY AGREEMENT (Continued)

Loan No: 2382555007

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Related Documents

False Statements. Any warranty, representation or statement made or furnished to Lender by Grantor or on Grantor's behalf under this Agreement or the Related Documents is false or misleading in any material respect, either now or at the time made or furnished or becomes false or misleading at any time thereafter.

Defective Collateralization. This Agreement or any of the Related Documents ceases to be in full force and effect (including failure of any collateral document to create a valid and perfected security interest or lien) at any time and for any reason.

Insolvency. The dissolution or termination of Grantor's existence as a going business, the insolvency of Grantor, the appointment of a receiver for any part of Grantor's property, any assignment for the benefit of creditors, any type of creditor workout, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Grantor.

Creditor or Foreclosure Proceedings. Commencement of foreclosure or forfeiture proceedings, whether by judicial proceeding, self-help, repossession or any other method, by any creditor of Grantor or by any governmental agency against any collateral securing the indebtedness. This includes a garnishment of any of Grantor's accounts, including deposit accounts, with Lender. However, this Event of Default shall not apply if there is a good faith dispute by Grantor as to the validity or reasonableness of the claim which is the basis of the creditor or forfeiture proceeding and if Grantor gives Lender written notice of the creditor or forfeiture proceeding and deposits with Lender monies or a surety bond for the creditor or forfeiture proceeding, in an amount determined by Lender, in its sole discretion, as being an adequate reserve or bond for the dispute.

Events Affecting Guarantor. Any of the preceding events occurs with respect to any Guarantor of any of the indebtedness or Guarantor dies or becomes incompetent or revokes or disputes the validity of, or liability under, any Guaranty of the indebtedness.

Adverse Change. A material adverse change occurs in Grantor's financial condition, or Lender believes the prospect of payment or performance of the indebtedness is impaired.

Insecurity. Lender in good faith believes itself insecure

Cure Provisions. If any default, other than a default in payment is curable and if Grantor has not been given a notice of a breach of the same provision of this Agreement within the preceding twelve (12) months, it may be cured if Grantor, after receiving written notice from Lender demanding cure of such default, (1) cures the default within fifteen (15) days; or (2) if the cure requires more than fifteen (15) days, immediately initiates steps which Lender deems in Lender's sole discretion to be sufficient to cure the default and thereafter continues and completes all reasonable and necessary steps sufficient to produce compliance as soon as reasonably practical.

RIGHTS AND REMEDIES ON DEFAULT. If an Event of Default occurs under this Agreement, at any time thereafter, Lender shall have all the rights of a secured party under the Idaho Uniform Commercial Code. In addition and without limitation, Lender may exercise any one or more of the following rights and remedies:

Notice of Default. In the Event of Default Lender shall execute or cause the Trustee to execute a written notice of such default and of Lender's election to cause the Property to be sold to satisfy the indebtedness, and shall cause such notice to be recorded in the office of the recorder of each county wherein the Real Property, or any part thereof, is situated.

Accelerate Indebtedness. Lender may declare the entire indebtedness, including any prepayment penalty which Grantor would be required to pay, immediately due and payable, without notice of any kind to Grantor

Assemble Collateral. Lender may require Grantor to deliver to Lender all or any portion of the Collateral and any and all certificates of title and other documents relating to the Collateral. Lender may require Grantor to assemble the Collateral and make it available to Lender at a place to be designated by Lender. Lender also shall have full power to enter upon the property of Grantor to take possession of and remove the Collateral. If the Collateral contains other goods not covered by this Agreement at the time of repossession, Grantor agrees Lender may take such other goods, provided that Lender makes reasonable efforts to return them to Grantor after repossession.

Sell the Collateral. Lender shall have full power to sell, lease, transfer, or otherwise deal with the Collateral or proceeds thereof in Lender's own name or that of Grantor. Lender may sell the Collateral at public auction or private sale. Unless the Collateral threatens to decline speedily in value or is of a type customarily sold on a recognized market, Lender will give Grantor, and other persons as required by law, reasonable notice of the time and place of any public sale, or the time after which any private sale or any other disposition of the Collateral is to be made. However, no notice need be provided to any person who, after Event of Default occurs, enters into and authenticates an agreement waiving that person's right to notification of sale. The requirements of reasonable notice shall be met if such notice is given at least ten (10) days before the time of the sale or disposition. All expenses relating to the disposition of the Collateral, including without limitation the expenses of retaking, holding, insuring, preparing for sale and selling the Collateral, shall become a part of the indebtedness secured by this Agreement and shall be payable on demand, with interest at the Note rate from date of expenditure until repaid.

Appoint Receiver. Lender shall have the right to have a receiver appointed to take possession of all or any part of the Collateral, with the power to protect and preserve the Collateral, to operate the Collateral preceding foreclosure or sale, and to collect the Rents from the Collateral and apply the proceeds, over and above the cost of the receivership, against the indebtedness. The receiver may serve without bond if permitted by law. Lender's right to the appointment of a receiver shall exist whether or not the apparent value of the Collateral exceeds the indebtedness by a substantial amount. Employment by Lender shall not disqualify a person from serving as a receiver.

Collect Revenues, Apply Accounts. Lender, either itself or through a receiver, may collect the payments, rents, income, and revenues from the Collateral. Lender may at any time in Lender's discretion transfer any Collateral into Lender's own name or that of Lender's nominee and receive the payments, rents, income, and revenues therefrom and hold the same as security for the indebtedness or apply it to payment of the indebtedness in such order of preference as Lender may determine. Insofar as the Collateral consists of accounts, general intangibles, insurance policies, instruments, chattel paper, choses in action, or similar property, Lender may demand, collect, receipt for, settle, compromise, adjust, sue for, foreclose, or realize on the Collateral as Lender may determine, whether or not indebtedness or Collateral is then due. For these purposes, Lender may, on behalf of and in the name of Grantor, receive, open and dispose of mail addressed to Grantor, change any address to which mail and payments are to be sent; and endorse notes, checks, drafts, money orders, documents of title, instruments and items pertaining to payment, shipment, or storage of any Collateral. To facilitate collection, Lender may notify account debtors and obligors on any Collateral to make payments directly to Lender.

Obtain Deficiency. If Lender chooses to sell any or all of the Collateral, Lender may obtain a judgment against Grantor for any deficiency remaining on the indebtedness due to Lender after application of all amounts received from the exercise of the rights provided in this Agreement. Grantor shall be liable for a deficiency even if the transaction described in this subsection is a sale of accounts or chattel paper.

Other Rights and Remedies. Lender shall have all the rights and remedies of a secured creditor under the provisions of the Uniform Commercial Code, as may be amended from time to time. In addition, Lender shall have and may exercise any or all other rights and remedies it may have available at law, in equity, or otherwise.

**COMMERCIAL SECURITY AGREEMENT
(Continued)**

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Election of Remedies. Except as may be prohibited by applicable law, all of Lender's rights and remedies, whether evidenced by this Agreement, the Related Documents, or by any other writing, shall be cumulative and may be exercised singularly or concurrently. Election by Lender to pursue any remedy shall not exclude pursuit of any other remedy, and an election to make expenditures or to take action to perform an obligation of Grantor under this Agreement, after Grantor's failure to perform, shall not affect Lender's right to declare a default and exercise its remedies.

SMALL BUSINESS ADMINISTRATION SPECIAL PROVISIONS. "The Loan secured by this lien was made under a United States Small Business Administration (SBA) nationwide program which uses tax dollars to assist small business owners. If the United States is seeking to enforce this document, then under SBA regulations: a) When SBA is the holder of the Note, this document and all documents evidencing or securing this Loan will be construed in accordance with federal law b) Lender or SBA may use local or state procedures for purposes such as filing papers, recording documents, giving notice, foreclosing liens, and other purposes. By using these procedures, SBA does not waive any federal immunity from local or state control, penalty, tax or liability. No Borrower or Guarantor may claim or assert against SBA any local or state law to deny any obligation of Borrower, or defeat any claim of SBA with respect to this Loan. Any clause in this document requiring arbitration is not enforceable when SBA is the holder of the Note secured by this instrument."

MISCELLANEOUS PROVISIONS. The following miscellaneous provisions are a part of this Agreement:

Amendments. This Agreement, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Agreement. No alteration or amendment to this Agreement shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.

Attorneys' Fees; Expenses. Grantor agrees to pay upon demand all of Lender's costs and expenses, including Lender's reasonable attorneys' fees and Lender's legal expenses, incurred in connection with the enforcement of this Agreement. Lender may hire or pay someone else to help enforce this Agreement, and Grantor shall pay the costs and expenses of such enforcement. Costs and expenses include Lender's reasonable attorneys' fees and legal expenses whether or not there is a lawsuit, including reasonable attorneys' fees and legal expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals, and any anticipated post-judgment collection services. Grantor also shall pay all court costs and such additional fees as may be directed by the court.

Caption Headings. Caption headings in this Agreement are for convenience purposes only and are not to be used to interpret or define the provisions of this Agreement.

Governing Law. This Agreement will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of Idaho without regard to its conflicts of law provisions. This Agreement has been accepted by Lender in the State of Idaho.

No Waiver by Lender. Lender shall not be deemed to have waived any rights under this Agreement unless such waiver is given in writing and signed by Lender. No delay or omission on the part of Lender in exercising any right shall operate as a waiver of such right or any other right. A waiver by Lender of a provision of this Agreement shall not prejudice or constitute a waiver of Lender's right otherwise to demand strict compliance with that provision or any other provision of this Agreement. No prior waiver by Lender, nor any course of dealing between Lender and Grantor, shall constitute a waiver of any of Lender's rights or of any of Grantor's obligations as to any future transactions. Whenever the consent of Lender is required under this Agreement, the granting of such consent by Lender in any instance shall not constitute continuing consent to subsequent instances where such consent is required and in all cases such consent may be granted or withheld in the sole discretion of Lender.

Notices. Any notice required to be given under this Agreement shall be given in writing, and shall be effective when actually delivered, when actually received by telefacsimile (unless otherwise required by law), when deposited with a nationally recognized overnight courier, or, if mailed, when deposited in the United States mail, as first class, certified or registered mail postage prepaid, directed to the addresses shown near the beginning of this Agreement. Any party may change its address for notices under this Agreement by giving formal written notice to the other parties, specifying that the purpose of the notice is to change the party's address. For notice purposes, Grantor agrees to keep Lender informed at all times of Grantor's current address. Unless otherwise provided or required by law, if there is more than one Grantor, any notice given by Lender to any Grantor is deemed to be notice given to all Grantors.

Power of Attorney. Grantor hereby appoints Lender as Grantor's irrevocable attorney-in-fact for the purpose of executing any documents necessary to perfect, amend, or to continue the security interest granted in this Agreement or to demand termination of filings of other secured parties. Lender may at any time, and without further authorization from Grantor, file a carbon, photographic or other reproduction of any financing statement or of this Agreement for use as a financing statement. Grantor will reimburse Lender for all expenses for the perfection and the continuation of the perfection of Lender's security interest in the Collateral.

Severability. If a court of competent jurisdiction finds any provision of this Agreement to be illegal, invalid, or unenforceable as to any circumstance, that finding shall not make the offending provision illegal, invalid, or unenforceable as to any other circumstance. If feasible, the offending provision shall be considered modified so that it becomes legal, valid and enforceable. If the offending provision cannot be so modified, it shall be considered deleted from this Agreement. Unless otherwise required by law, the illegality, invalidity, or unenforceability of any provision of this Agreement shall not affect the legality, validity or enforceability of any other provision of this Agreement.

Successors and Assigns. Subject to any limitations stated in this Agreement on transfer of Grantor's interest, this Agreement shall be binding upon and inure to the benefit of the parties, their successors and assigns. If ownership of the Collateral becomes vested in a person other than Grantor, Lender, without notice to Grantor, may deal with Grantor's successors with reference to this Agreement and the indebtedness by way of forbearance or extension without releasing Grantor from the obligations of this Agreement or liability under the indebtedness.

Survival of Representations and Warranties. All representations, warranties, and agreements made by Grantor in this Agreement shall survive the execution and delivery of this Agreement, shall be continuing in nature, and shall remain in full force and effect until such time as Grantor's indebtedness shall be paid in full.

Time is of the Essence. Time is of the essence in the performance of this Agreement.

Waive Jury. All parties to this Agreement hereby waive the right to any jury trial in any action, proceeding, or counterclaim brought by any party against any other party.

DEFINITIONS. The following capitalized words and terms shall have the following meanings when used in this Agreement. Unless specifically stated to the contrary, all references to dollar amounts shall mean amounts in lawful money of the United States of America. Words and terms used in the singular shall include the plural, and the plural shall include the singular, as the context may require. Words and terms not otherwise defined in this Agreement shall have the meanings attributed to such terms in the Uniform Commercial Code.

Agreement. The word "Agreement" means this Commercial Security Agreement, as this Commercial Security Agreement may be amended.

**COMMERCIAL SECURITY AGREEMENT
(Continued)**

Loan No: 2382555007

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or modified from time to time, together with all exhibits and schedules attached to this Commercial Security Agreement from time to time.

Borrower. The word "Borrower" means Tri-Steel Construction Company, Inc. and includes all co-signers and co-makers signing the Note and all their successors and assigns.

Collateral. The word "Collateral" means all of Grantor's right, title and interest in and to all the Collateral as described in the Collateral Description section of this Agreement.

Default. The word "Default" means the Default set forth in this Agreement in the section titled "Default."

Environmental Laws. The words "Environmental Laws" mean any and all state, federal and local statutes, regulations and ordinances relating to the protection of human health or the environment, including without limitation the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. Section 9601, et seq. ("CERCLA"), the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 ("SARA"), the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801, et seq., the Resource Conservation and Recovery Act, 42 U.S.C. Section 8901, et seq., or other applicable state or federal laws, rules, or regulations adopted pursuant thereto.

Event of Default. The words "Event of Default" mean any of the events of default set forth in this Agreement in the default section of this Agreement.

Grantor. The word "Grantor" means Tri-Steel Construction Company, Inc..

Guarantor. The word "Guarantor" means any guarantor, surety, or accommodation party of any or all of the Indebtedness.

Guaranty. The word "Guaranty" means the guaranty from Guarantor to Lender, including without limitation a guaranty of all or part of the Note.

Hazardous Substances. The words "Hazardous Substances" mean materials that, because of their quantity, concentration or physical, chemical or infectious characteristics, may cause or pose a present or potential hazard to human health or the environment when improperly used, treated, stored, disposed of, generated, manufactured, transported or otherwise handled. The words "Hazardous Substances" are used in their very broadest sense and include without limitation any and all hazardous or toxic substances, materials or waste as defined by or listed under the Environmental Laws. The term "Hazardous Substances" also includes, without limitation, petroleum and petroleum by-products or any fraction thereof and asbestos.

Indebtedness. The word "Indebtedness" means the indebtedness evidenced by the Note or Related Documents, including all principal and interest together with all other indebtedness and costs and expenses for which Grantor is responsible under this Agreement or under any of the Related Documents. Specifically, without limitation, Indebtedness includes all amounts that may be indirectly secured by the Cross-Collateralization provision of this Agreement.

Lender. The word "Lender" means KeyBank National Association, its successors and assigns.

Note. The word "Note" means the Note executed by Tri-Steel Construction Company, Inc. in the principal amount of \$150,000.00 dated April 16, 2007, together with all renewals of, extensions of, modifications of, refinancings of, consolidations of, and substitutions for the note or credit agreement.

Property. The word "Property" means all of Grantor's right, title and interest in and to all the Property as described in the "Collateral Description" section of this Agreement.

Real Property. The words "Real Property" mean the real property, interests and rights, as further described in this Agreement.

Related Documents. The words "Related Documents" mean all promissory notes, credit agreements, loan agreements, environmental agreements, guaranties, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness.

GRANTOR HAS READ AND UNDERSTOOD ALL THE PROVISIONS OF THIS COMMERCIAL SECURITY AGREEMENT AND AGREES TO ITS TERMS. THIS AGREEMENT IS DATED APRIL 16, 2007.

GRANTOR:

TRI-STEEL CONSTRUCTION COMPANY, INC.

By: LuDean Palmer

LuDean Palmer, Secretary of Tri-Steel Construction Company, Inc.

By: Dean L. Palmer

Dean L. Palmer, President of Tri-Steel Construction Company, Inc.

UCC FINANCING STATEMENT

ELECTRONIC FILING*

A. NAME, PHONE, EMAIL, FAX OF CONTACT AT FILER:
NATHAN | --- | NATHAN J LEACH@KEYBANK.COM | ---B. SEND ACKNOWLEDGMENT TO: (Name and Address)
KEYBANK NA

IDAHO SECRETARY OF STATE

4/23/2007 13:53:13

\$3.00

Filing Number:

B 2007-1024332-4

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. DEBTOR'S EXACT FULL LEGAL NAME: - Insert only one debtor name (1a or 1b) - do not abbreviate or combine names

1a. ORGANIZATION'S NAME:

OR TRI-STEEL CONSTRUCTION COMPANY, INC.

1b. LAST NAME:

FIRST NAME:

MIDDLE NAME:

SUFFIX:

1c. MAILING ADDRESS:

1305 S 12TH W

CITY:

REXBURG

STATE: POSTAL CODE:

ID 83440

COUNTRY:

USA

1. TAX ID #: SEN OR TIN

ADD BEFORE
ORGANIZATION
DEBTOR:

1a. TYPE OF ORG:

CORPORATION

1f. JURISDICTION OF ORG:

IDAHO

1g. ORGANIZATIONAL ID #: (if any)

C120860

3. SECURED PARTY'S NAME: (or NAME of TOTAL ASSIGNEE of ASSIGNOR S/P) - insert only one secured party name (3a or 3b)

3a. ORGANIZATION'S NAME:

OR KEYBANK NATIONAL ASSOCIATION

3b. LAST NAME:

FIRST NAME:

MIDDLE NAME:

SUFFIX:

3c. MAILING ADDRESS:

110 E. MAIN STREET

CITY:

REXBURG

STATE: POSTAL CODE:

ID 83440

COUNTRY:

USA

4. This FINANCING STATEMENT covers the following collateral:

ALL INVENTORY, EQUIPMENT, ACCOUNTS (INCLUDING BUT NOT LIMITED TO ALL HEALTH-CARE-INSURANCE RECEIVABLES), CHATTEL PAPER, INSTRUMENTS (INCLUDING BUT NOT LIMITED TO ALL PROMISSORY NOTES), LETTER-OF-CREDIT RIGHTS, LETTERS OF CREDIT, DOCUMENTS, DEPOSIT ACCOUNTS, INVESTMENT PROPERTY, MONEY, OTHER RIGHTS TO PAYMENT AND PERFORMANCE, AND GENERAL INTANGIBLES (INCLUDING BUT NOT LIMITED TO ALL SOFTWARE AND ALL PAYMENT INTANGIBLES); ALL OIL, GAS AND OTHER MINERALS BEFORE EXTRACTION; ALL OIL, GAS, OTHER MINERALS AND ACCOUNTS CONSTITUTING AS-EXTRACTED COLLATERAL; ALL FIXTURES; ALL TIMBER TO BE CUT; ALL ATTACHMENTS, ACCESSIONS, ACCESSORIES, FITTINGS, INCREASES, TOOLS, PARTS, REPAIRS, SUPPLIES, AND COMMINGLED GOODS RELATING TO THE FOREGOING PROPERTY, AND ALL ADDITIONS, REPLACEMENTS OF AND SUBSTITUTIONS FOR ALL OR ANY PART OF THE FOREGOING PROPERTY; ALL INSURANCE REFUNDS RELATING TO THE FOREGOING PROPERTY; ALL GOOD WILL RELATING TO THE FOREGOING PROPERTY; ALL RECORDS AND DATA AND EMBEDDED SOFTWARE RELATING TO THE FOREGOING PROPERTY, AND ALL EQUIPMENT, INVENTORY AND SOFTWARE TO UTILIZE, CREATE, MAINTAIN AND PROCESS ANY SUCH RECORDS AND DATA ON ELECTRONIC MEDIA; AND ALL SUPPORTING OBLIGATIONS RELATING TO THE FOREGOING PROPERTY; ALL WHETHER NOW EXISTING OR HEREAFTER ARISING, WHETHER NOW OWNED OR HEREAFTER ACQUIRED OR WHETHER NOW OR HEREAFTER SUBJECT TO ANY RIGHTS IN THE FOREGOING PROPERTY; AND ALL PRODUCTS AND PROCEEDS (INCLUDING BUT NOT LIMITED TO ALL INSURANCE PAYMENTS) OF OR RELATING TO THE FOREGOING PROPERTY.

5. ALTERNATIVE DESIGNATION (if applicable):

☐ LESSEE/LESSOR ☐ CONSIGNEE/CONSIGNOR ☐ BAILEE/BAILOR ☐ SELLER/BUYER6. ☐ This FINANCING STATEMENT is to be filed (for record) (or recorded) in the REAL ESTATE RECORDS. Attach Addendum (if applicable)

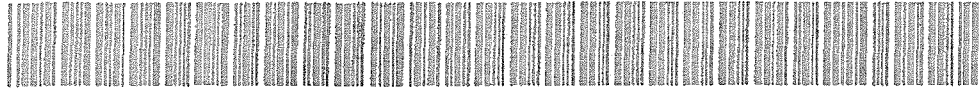
7. Check to REQUEST SEARCH REPORT(S) on Debtor(s)

(ADDITIONAL FEE) (optional) ☐ All Debtors ☐ Debtor 1 ☐ Debtor 2

8. OPTIONAL FILER REFERENCE DATA:

5802420491 - 18

*Electronically generated from original XML Document



5656024204910000000010E40

COMMERCIAL SECURITY AGREEMENT

Principal	Loan Date	Maturity	Loan No.	Call Date	Account	Officer	Initials
565602420491	12-05-2008	02-10-2011		12/5/2011	E560242049	JK301	

References in the boxes above are for Lender's use only and do not limit the applicability of this document to any particular loan or item.
Any item above containing "****" has been omitted due to text length limitations.

Grantor: Tri-Steel Construction Company, Inc.
1305 S 12th West
Rexburg, ID 83440

Lender: KeyBank National Association
ID-SA-Boise Asset Recovery Group
702 W. Idaho
Boise, ID 83702

THIS COMMERCIAL SECURITY AGREEMENT dated December 5, 2008, is made and executed between Tri-Steel Construction Company, Inc. ("Grantor") and KeyBank National Association ("Lender").

GRANT OF SECURITY INTEREST. For valuable consideration, Grantor grants to Lender a security interest in the Collateral to secure the indebtedness and agrees that Lender shall have the rights stated in this Agreement with respect to the Collateral, in addition to all other rights which Lender may have by law.

COLLATERAL DESCRIPTION. The word "Collateral" as used in this Agreement means the following described property, whether now owned or hereafter acquired, whether now existing or hereafter arising, and wherever located, in which Grantor is giving to Lender a security interest for the payment of the indebtedness and performance of all other obligations under the Note and this Agreement:

All inventory, equipment, accounts (including but not limited to all health-care-insurance receivables), chattel paper, instruments (including but not limited to all promissory notes), letter-of-credit rights, letters of credit, documents, deposit accounts, investment property, money, other rights to payment and performance, and general intangibles (including but not limited to all software and all payment intangibles); all oil, gas and other minerals before extraction; all oil, gas, other minerals and accounts constituting as-extracted collateral; all fixtures; all timber to be cut; all attachments, accessions, accessories, fittings, increases, tools, parts, repairs, supplies, and commingled goods relating to the foregoing property, and all additions, replacements of and substitutions for all or any part of the foregoing property; all insurance refunds relating to the foregoing property; all good will relating to the foregoing property; all records and data and embedded software relating to the foregoing property, and all equipment, inventory and software to utilize, create, maintain and process any such records and data on electronic media; and all supporting obligations relating to the foregoing property; all whether now existing or hereafter arising, whether now owned or hereafter acquired or whether now or hereafter subject to any rights in the foregoing property; and all products and proceeds (including but not limited to all insurance payments) of or relating to the foregoing property.

In addition, the word "Collateral" also includes all the following, whether now owned or hereafter acquired, whether now existing or hereafter arising, and wherever located:

- (A) All accessions, attachments, accessories, tools, parts, supplies, replacements of and additions to any of the collateral described herein, whether added now or later.
- (B) All products and produce of any of the property described in this Collateral section.
- (C) All accounts, general intangibles, instruments, rents, monies, payments, and all other rights, arising out of a sale, lease, consignment or other disposition of any of the property described in this Collateral section.
- (D) All proceeds (including insurance proceeds) from the sale, destruction, loss, or other disposition of any of the property described in this Collateral section, and sums due from a third party who has damaged or destroyed the Collateral or from that party's insurer, whether due to judgment, settlement or other process.
- (E) All records and data relating to any of the property described in this Collateral section, whether in the form of a writing, photograph, microfilm, microfiche, or electronic media, together with all of Grantor's right, title, and interest in and to all computer software required to utilize, create, maintain, and process any such records or data on electronic media.

CROSS-COLLATERALIZATION. In addition to the Note, this Agreement secures all obligations, debts and liabilities, plus interest thereon, of Grantor to Lender, or any one or more of them, as well as all claims by Lender against Grantor or any one or more of them, whether now existing or hereafter arising, whether related or unrelated to the purpose of the Note, whether voluntary or otherwise, whether due or not due, direct or indirect, determined or undetermined, absolute or contingent, liquidated or unliquidated, whether Grantor may be liable individually or jointly with others, whether obligated as guarantor, surety, accommodation party or otherwise, and whether recovery upon such amounts may be or hereafter may become barred by any statute of limitations, and whether the obligation to repay such amounts may be or hereafter may become otherwise unenforceable.

RIGHT OF SETOFF. To the extent permitted by applicable law, Lender reserves a right of setoff in all Grantor's accounts with Lender (whether checking, savings, or some other account). This includes all accounts Grantor holds jointly with someone else and all accounts Grantor may open in the future. However, this does not include any IRA or Keogh accounts, or any trust accounts for which setoff would be prohibited by law. Grantor authorizes Lender, to the extent permitted by applicable law, to charge or setoff all sums owing on the indebtedness against any and all such accounts.

GRANTOR'S REPRESENTATIONS AND WARRANTIES WITH RESPECT TO THE COLLATERAL. With respect to the Collateral, Grantor represents and promises to Lender that:

Perfection of Security Interest. Grantor agrees to take whatever actions are requested by Lender to perfect and continue Lender's security interest in the Collateral. Upon request of Lender, Grantor will deliver to Lender any and all of the documents evidencing or constituting the Collateral, and Grantor will note Lender's interest upon any and all chattel paper and instruments if not delivered to Lender for possession by Lender. This is a continuing Security Agreement and will continue in effect even though all or any part of the indebtedness is paid in full and even though for a period of time Grantor may not be indebted to Lender.

Notices to Lender. Grantor will promptly notify Lender in writing at Lender's address shown above (or such other addresses as Lender may designate from time to time) prior to any (1) change in Grantor's name; (2) change in Grantor's assumed business name(s); (3) change

in the management of the Corporation Grantor; (4) change in the authorized signer(s); (5) change in Grantor's principal office address; (6) change in Grantor's state of organization; (7) conversion of Grantor to a new or different type of business entity; or (8) change in any other aspect of Grantor that directly or indirectly relates to any agreements between Grantor and Lender. No change in Grantor's name or state of organization will take effect until after Lender has received notice.

No Violation. The execution and delivery of this Agreement will not violate any law or agreement governing Grantor or to which Grantor is a party, and its certificate or articles of incorporation and bylaws do not prohibit any term or condition of this Agreement.

Enforceability of Collateral. To the extent the Collateral consists of accounts, chattel paper, or general intangibles, as defined by the Uniform Commercial Code, the Collateral is enforceable in accordance with its terms, is genuine, and fully complies with all applicable laws and regulations concerning form, content and manner of preparation and execution, and all persons appearing to be obligated on the Collateral have authority and capacity to contract and are in fact obligated as they appear to be on the Collateral. At the time any account becomes subject to a security interest in favor of Lender, the account shall be a good and valid account representing an undisputed, bona fide indebtedness incurred by the account debtor, for merchandise held subject to delivery instructions or previously shipped or delivered pursuant to a contract of sale, or for services previously performed by Grantor with or for the account debtor. So long as this Agreement remains in effect, Grantor shall not, without Lender's prior written consent, compromise, settle, adjust, or extend payment under or with regard to any such Accounts. There shall be no setoffs or counterclaims against any of the Collateral, and no agreement shall have been made under which any deductions or discounts may be claimed concerning the Collateral except those disclosed to Lender in writing.

Location of the Collateral. Except in the ordinary course of Grantor's business, Grantor agrees to keep the Collateral (or to the extent the Collateral consists of intangible property such as accounts or general intangibles, the records concerning the Collateral) at Grantor's address shown above or at such other locations as are acceptable to Lender. Upon Lender's request, Grantor will deliver to Lender in form satisfactory to Lender a schedule of real properties and Collateral locations relating to Grantor's operations, including without limitation the following: (1) all real property Grantor owns or is purchasing; (2) all real property Grantor is renting or leasing; (3) all storage facilities Grantor owns, rents, leases, or uses; and (4) all other properties where Collateral is or may be located.

Removal of the Collateral. Except in the ordinary course of Grantor's business, including the sales of inventory, Grantor shall not remove the Collateral from its existing location without Lender's prior written consent. To the extent that the Collateral consists of vehicles, or other titled property, Grantor shall not take or permit any action which would require application for certificates of title for the vehicles outside the State of Idaho, without Lender's prior written consent. Grantor shall, whenever requested, advise Lender of the exact location of the Collateral.

Transactions Involving Collateral. Except for inventory sold or accounts collected in the ordinary course of Grantor's business, or as otherwise provided for in this Agreement, Grantor shall not sell, offer to sell, or otherwise transfer or dispose of the Collateral. While Grantor is not in default under this Agreement, Grantor may sell inventory, but only in the ordinary course of its business and only to buyers who qualify as a buyer in the ordinary course of business. A sale in the ordinary course of Grantor's business does not include a transfer in partial or total satisfaction of a debt or any bulk sale. Grantor shall not pledge, mortgage, encumber or otherwise permit the Collateral to be subject to any lien, security interest, encumbrance, or charge, other than the security interest provided for in this Agreement, without the prior written consent of Lender. This includes security interests even if junior in right to the security interests granted under this Agreement. Unless waived by Lender, all proceeds from any disposition of the Collateral (for whatever reason) shall be held in trust for Lender and shall not be commingled with any other funds; provided however, this requirement shall not constitute consent by Lender to any sale or other disposition. Upon receipt, Grantor shall immediately deliver any such proceeds to Lender.

Title. Grantor represents and warrants to Lender that Grantor holds good and marketable title to the Collateral, free and clear of all liens and encumbrances except for the lien of this Agreement. No financing statement covering any of the Collateral is on file in any public office other than those which reflect the security interest created by this Agreement or to which Lender has specifically consented. Grantor shall defend Lender's rights in the Collateral against the claims and demands of all other persons.

Repairs and Maintenance. Grantor agrees to keep and maintain, and to cause others to keep and maintain, the Collateral in good order, repair and condition at all times while this Agreement remains in effect. Grantor further agrees to pay when due all claims for work done on, or services rendered or material furnished in connection with the Collateral so that no lien or encumbrance may ever attach to or be filed against the Collateral.

Inspection of Collateral. Lender and Lender's designated representatives and agents shall have the right at all reasonable times to examine and inspect the Collateral wherever located.

Taxes, Assessments and Liens. Grantor will pay when due all taxes, assessments and liens upon the Collateral, its use or operation, upon this Agreement, upon any promissory note or notes evidencing the indebtedness, or upon any of the other Related Documents. Grantor may withhold any such payment or may elect to contest any lien if Grantor is in good faith conducting an appropriate proceeding to contest the obligation to pay and so long as Lender's interest in the Collateral is not jeopardized in Lender's sole opinion. If the Collateral is subjected to a lien which is not discharged within fifteen (15) days, Grantor shall deposit with Lender cash, a sufficient corporate surety bond or other security satisfactory to Lender in an amount adequate to provide for the discharge of the lien plus any interest, costs, reasonable attorneys' fees or other charges that could accrue as a result of foreclosure or sale of the Collateral. In any contest Grantor shall defend itself and Lender and shall satisfy any final adverse judgment before enforcement against the Collateral. Grantor shall name Lender as an additional obligee under any surety bond furnished in the contest proceedings. Grantor further agrees to furnish Lender with evidence that such taxes, assessments, and governmental and other charges have been paid in full and in a timely manner. Grantor may withhold any such payment or may elect to contest any lien if Grantor is in good faith conducting an appropriate proceeding to contest the obligation to pay and so long as Lender's interest in the Collateral is not jeopardized.

Compliance with Governmental Requirements. Grantor shall comply promptly with all laws, ordinances, rules and regulations of all governmental authorities, now or hereafter in effect, applicable to the ownership, production, disposition, or use of the Collateral, including all laws or regulations relating to the undue erosion of highly-erodible land or relating to the conversion of wetlands for the production of an agricultural product or commodity. Grantor may contest in good faith any such law, ordinance or regulation and withhold compliance during any proceeding, including appropriate appeals, so long as Lender's interest in the Collateral, in Lender's opinion, is not jeopardized.

Hazardous Substances. Grantor represents and warrants that the Collateral never has been, and never will be so long as this Agreement remains a lien on the Collateral, used in violation of any Environmental Laws or for the generation, manufacture, storage, transportation, treatment, disposal, release or threatened release of any Hazardous Substance. The representations and warranties contained herein are based on Grantor's due diligence in investigating the Collateral for Hazardous Substances. Grantor hereby (1) releases and waives any future claims against Lender for indemnity or contribution in the event Grantor becomes liable for cleanup or other costs under any Environmental Laws, and (2) agrees to indemnify, defend, and hold harmless Lender against any and all claims and losses resulting from a breach of this provision of this Agreement. This obligation to indemnify and defend shall survive the payment of the indebtedness and the satisfaction of this Agreement.

**COMMERCIAL SECURITY AGREEMENT
(Continued)**

Loan No: 1

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Maintenance of Casualty Insurance. Grantor shall procure and maintain all risks insurance, including without limitation fire, theft and liability coverage together with such other insurance as Lender may require with respect to the Collateral, in form, amounts, coverages and basis reasonably acceptable to Lender and issued by a company or companies reasonably acceptable to Lender. Grantor, upon request of Lender, will deliver to Lender from time to time the policies or certificates of insurance in form satisfactory to Lender, including stipulations that coverages will not be cancelled or diminished without at least ten (10) days' prior written notice to Lender and not including any disclaimer of the insurer's liability for failure to give such a notice. Each insurance policy also shall include an endorsement providing that coverage in favor of Lender will not be impaired in any way by any act, omission or default of Grantor or any other person. In connection with all policies covering assets in which Lender holds or is offered a security interest, Grantor will provide Lender with such loss payable or other endorsements as Lender may require. If Grantor at any time fails to obtain or maintain any insurance as required under this Agreement, Lender may (but shall not be obligated to) obtain such insurance as Lender deems appropriate, including if Lender so chooses "single interest insurance," which will cover only Lender's interest in the Collateral.

Application of Insurance Proceeds. Grantor shall promptly notify Lender of any loss or damage to the Collateral if the estimated cost of repair or replacement exceeds \$500.00, whether or not such casualty or loss is covered by insurance. Lender may make proof of loss if Grantor fails to do so within fifteen (15) days of the casualty. All proceeds of any insurance on the Collateral, including accrued proceeds thereon, shall be held by Lender as part of the Collateral. If Lender consents to repair or replacement of the damaged or destroyed Collateral, Lender shall, upon satisfactory proof of expenditure, pay or reimburse Grantor from the proceeds for the reasonable cost of repair or restoration. If Lender does not consent to repair or replacement of the Collateral, Lender shall retain a sufficient amount of the proceeds to pay all of the indebtedness, and shall pay the balance to Grantor. Any proceeds which have not been disbursed within six (6) months after their receipt and which Grantor has not committed to the repair or restoration of the Collateral shall be used to prepay the indebtedness.

Insurance Reserves. Lender may require Grantor to maintain with Lender reserves for payment of insurance premiums, which reserves shall be created by monthly payments from Grantor of a sum estimated by Lender to be sufficient to produce, at least fifteen (15) days before the premium due date, amounts at least equal to the insurance premiums to be paid. If fifteen (15) days before payment is due, the reserve funds are insufficient, Grantor shall upon demand pay any deficiency to Lender. The reserve funds shall be held by Lender as a general deposit and shall constitute a non-interest-bearing account which Lender may satisfy by payment of the insurance premiums required to be paid by Grantor as they become due. Lender does not hold the reserve funds in trust for Grantor, and Lender is not the agent of Grantor for payment of the insurance premiums required to be paid by Grantor. The responsibility for the payment of premiums shall remain Grantor's sole responsibility.

Insurance Reports. Grantor, upon request of Lender, shall furnish to Lender reports on each existing policy of insurance showing such information as Lender may reasonably request including the following: (1) the name of the insurer; (2) the risks insured; (3) the amount of the policy; (4) the property insured; (5) the then current value on the basis of which insurance has been obtained and the manner of determining that value; and (6) the expiration date of the policy. In addition, Grantor shall upon request by Lender (however not more often than annually) have an independent appraiser satisfactory to Lender determine, as applicable, the cash value or replacement cost of the Collateral.

Financing Statements. Grantor authorizes Lender to file a UCC financing statement, or alternatively, a copy of this Agreement to perfect Lender's security interest. At Lender's request, Grantor additionally agrees to sign all other documents that are necessary to perfect, protect, and continue Lender's security interest in the Property. This includes making sure Lender is shown as the first and only security interest holder on the title covering the Property. Grantor will pay all filing fees, title transfer fees, and other fees and costs involved unless prohibited by law or unless Lender is required by law to pay such fees and costs. Grantor irrevocably appoints Lender to execute documents necessary to transfer title if there is a default. Lender may file a copy of this Agreement as a financing statement. If Grantor changes Grantor's name or address, or the name or address of any person granting a security interest under this Agreement changes, Grantor will promptly notify the Lender of such change.

GRANTOR'S RIGHT TO POSSESSION AND TO COLLECT ACCOUNTS. Until default and except as otherwise provided below with respect to accounts, Grantor may have possession of the tangible personal property and beneficial use of all the Collateral and may use it in any lawful manner not inconsistent with this Agreement or the Related Documents, provided that Grantor's right to possession and beneficial use shall not apply to any Collateral where possession of the Collateral by Lender is required by law to perfect Lender's security interest in such Collateral. Until otherwise notified by Lender, Grantor may collect any of the Collateral consisting of accounts. At any time and even though no Event of Default exists, Lender may exercise its rights to collect the accounts and to notify account debtors to make payments directly to Lender for application to the indebtedness. If Lender at any time has possession of any Collateral, whether before or after an Event of Default, Lender shall be deemed to have exercised reasonable care in the custody and preservation of the Collateral if Lender takes such action for that purpose as Grantor shall request or as Lender, in Lender's sole discretion, shall deem appropriate under the circumstances, but failure to honor any request by Grantor shall not of itself be deemed to be a failure to exercise reasonable care. Lender shall not be required to take any steps necessary to preserve any rights in the Collateral against prior parties, nor to protect, preserve or maintain any security interest given to secure the indebtedness.

LENDER'S EXPENDITURES. If any action or proceeding is commenced that would materially affect Lender's interest in the Collateral or if Grantor fails to comply with any provision of this Agreement or any Related Documents, including but not limited to Grantor's failure to discharge or pay when due any amounts Grantor is required to discharge or pay under this Agreement or any Related Documents, Lender on Grantor's behalf may (but shall not be obligated to) take any action that Lender deems appropriate, including but not limited to discharging or paying all taxes, liens, security interests, encumbrances and other claims, at any time levied or placed on the Collateral and paying all costs for insuring, maintaining and preserving the Collateral. All such expenditures incurred or paid by Lender for such purposes will then bear interest at the rate charged under the Note from the date incurred or paid by Lender to the date of repayment by Grantor. All such expenses will become a part of the indebtedness and, at Lender's option, will (A) be payable on demand; (B) be added to the balance of the Note and be apportioned among and be payable with any installment payments to become due during either (1) the term of any applicable insurance policy; or (2) the remaining term of the Note; or (C) be treated as a balloon payment which will be due and payable at the Note's maturity. The Agreement also will secure payment of these amounts. Such right shall be in addition to all other rights and remedies to which Lender may be entitled upon Default.

DEFAULT. Each of the following shall constitute an Event of Default under this Agreement:

Payment Default. Grantor fails to make any payment when due under the indebtedness.

Other Defaults. Grantor fails to comply with or to perform any other term, obligation, covenant or condition contained in this Agreement or in any of the Related Documents or to comply with or to perform any term, obligation, covenant or condition contained in any other agreement between Lender and Grantor.

Default in Favor of Third Parties. Any guarantor or Grantor defaults under any loan, extension of credit, security agreement, purchase or sales agreement, or any other agreement, in favor of any other creditor or person that may materially affect any of any guarantor's or

**COMMERCIAL SECURITY AGREEMENT
(Continued)**

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Grantor's property or ability to perform their respective obligations under this Agreement or any of the Related Documents.

False Statements. Any warranty, representation or statement made or furnished to Lender by Grantor or on Grantor's behalf under this Agreement or the Related Documents is false or misleading in any material respect, either now or at the time made or furnished or becomes false or misleading at any time thereafter.

Defective Collateralization. This Agreement or any of the Related Documents ceases to be in full force and effect (including failure of any collateral document to create a valid and perfected security interest or lien) at any time and for any reason.

Insolvency. The dissolution or termination of Grantor's existence as a going business, the insolvency of Grantor, the appointment of a receiver for any part of Grantor's property, any assignment for the benefit of creditors, any type of creditor workout, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Grantor.

Creditor or Foreclosure Proceedings. Commencement of foreclosure or forfeiture proceedings, whether by judicial proceeding, self-help, repossession or any other method, by any creditor of Grantor or by any governmental agency against any collateral securing the indebtedness. This includes a garnishment of any of Grantor's accounts, including deposit accounts, with Lender. However, this Event of Default shall not apply if there is a good faith dispute by Grantor as to the validity or reasonableness of the claim which is the basis of the creditor or forfeiture proceeding and if Grantor gives Lender written notice of the creditor or forfeiture proceeding and deposits with Lender monies or a surety bond for the creditor or forfeiture proceeding, in an amount determined by Lender, in its sole discretion, as being an adequate reserve or bond for the dispute.

Events Affecting Guarantor. Any of the preceding events occurs with respect to any Guarantor of any of the Indebtedness or Guarantor dies or becomes incompetent or revokes or disputes the validity of, or liability under, any Guaranty of the Indebtedness.

Adverse Change. A material adverse change occurs in Grantor's financial condition, or Lender believes the prospect of payment or performance of the Indebtedness is impaired.

Insecurity. Lender in good faith believes itself insecure.

Cure Provisions. If any default, other than a default in payment is curable and if Grantor has not been given a notice of a breach of the same provision of this Agreement within the preceding twelve (12) months, it may be cured if Grantor, after receiving written notice from Lender demanding cure of such default: (1) cures the default within fifteen (15) days; or (2) if the cure requires more than fifteen (15) days, immediately initiates steps which Lender deems in Lender's sole discretion to be sufficient to cure the default and thereafter continues and completes all reasonable and necessary steps sufficient to produce compliance as soon as reasonably practical.

RIGHTS AND REMEDIES ON DEFAULT. If an Event of Default occurs under this Agreement, at any time thereafter, Lender shall have all the rights of a secured party under the Idaho Uniform Commercial Code. In addition and without limitation, Lender may exercise any one or more of the following rights and remedies:

Notice of Default. In the Event of Default Lender shall execute or cause the Trustee to execute a written notice of such default and of Lender's election to cause the Property to be sold to satisfy the Indebtedness, and shall cause such notice to be recorded in the office of the recorder of each county wherein the Real Property, or any part thereof, is situated.

Accelerate Indebtedness. Lender may declare the entire Indebtedness, including any prepayment penalty which Grantor would be required to pay, immediately due and payable, without notice of any kind to Grantor.

Assemble Collateral. Lender may require Grantor to deliver to Lender all or any portion of the Collateral and any and all certificates of title and other documents relating to the Collateral. Lender may require Grantor to assemble the Collateral and make it available to Lender at a place to be designated by Lender. Lender also shall have full power to enter upon the property of Grantor to take possession of and remove the Collateral. If the Collateral contains other goods not covered by this Agreement at the time of repossession, Grantor agrees Lender may take such other goods, provided that Lender makes reasonable efforts to return them to Grantor after repossession.

Sell the Collateral. Lender shall have full power to sell, lease, transfer, or otherwise deal with the Collateral or proceeds thereof in Lender's own name or that of Grantor. Lender may sell the Collateral at public auction or private sale. Unless the Collateral threatens to decline speedily in value or is of a type customarily sold on a recognized market, Lender will give Grantor, and other persons as required by law, reasonable notice of the time and place of any public sale, or the time after which any private sale or any other disposition of the Collateral is to be made. However, no notice need be provided to any person who, after Event of Default occurs, enters into and authenticates an agreement waiving that person's right to notification of sale. The requirements of reasonable notice shall be met if such notice is given at least ten (10) days before the time of the sale or disposition. All expenses relating to the disposition of the Collateral, including without limitation the expenses of retaking, holding, insuring, preparing for sale and selling the Collateral, shall become a part of the Indebtedness secured by this Agreement and shall be payable on demand, with interest at the Note rate from date of expenditure until repaid.

Appoint Receiver. Lender shall have the right to have a receiver appointed to take possession of all or any part of the Collateral, with the power to protect and preserve the Collateral, to operate the Collateral preceding foreclosure or sale, and to collect the Rents from the Collateral and apply the proceeds, over and above the cost of the receivership, against the Indebtedness. The receiver may serve without bond if permitted by law. Lender's right to the appointment of a receiver shall exist whether or not the apparent value of the Collateral exceeds the Indebtedness by a substantial amount. Employment by Lender shall not disqualify a person from serving as a receiver.

Collect Revenues, Apply Accounts. Lender, either itself or through a receiver, may collect the payments, rents, income, and revenues from the Collateral. Lender may at any time in Lender's discretion transfer any Collateral into Lender's own name or that of Lender's nominee and receive the payments, rents, income, and revenues therefrom and hold the same as security for the Indebtedness or apply it to payment of the Indebtedness in such order of preference as Lender may determine. Insofar as the Collateral consists of accounts, general intangibles, insurance policies, instruments, chattel paper, choses in action, or similar property, Lender may demand, collect, receipt for, settle, compromise, adjust, sue for, foreclose, or realize on the Collateral as Lender may determine, whether or not Indebtedness or Collateral is then due. For these purposes, Lender may, on behalf of and in the name of Grantor, receive, open and dispose of mail addressed to Grantor; change any address to which mail and payments are to be sent; and endorse notes, checks, drafts, money orders, documents of title, instruments and items pertaining to payment, shipment, or storage of any Collateral. To facilitate collection, Lender may notify account debtors and obligors on any Collateral to make payments directly to Lender.

Obtain Deficiency. If Lender chooses to sell any or all of the Collateral, Lender may obtain a judgment against Grantor for any deficiency remaining on the Indebtedness due to Lender after application of all amounts received from the exercise of the rights provided in this Agreement. Grantor shall be liable for a deficiency even if the transaction described in this subsection is a sale of accounts or chattel paper.

Other Rights and Remedies. Lender shall have all the rights and remedies of a secured creditor under the provisions of the Uniform Commercial Code, as may be amended from time to time. In addition, Lender shall have and may exercise any or all other rights and remedies it may have available at law, in equity, or otherwise.

**COMMERCIAL SECURITY AGREEMENT
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Election of Remedies. Except as may be prohibited by applicable law, all of Lender's rights and remedies, whether evidenced by this Agreement, the Related Documents, or by any other writing, shall be cumulative and may be exercised singularly or concurrently. Election by Lender to pursue any remedy shall not exclude pursuit of any other remedy, and an election to make expenditures or to take action to perform an obligation of Grantor under this Agreement, after Grantor's failure to perform, shall not affect Lender's right to declare a default and exercise its remedies.

MISCELLANEOUS PROVISIONS. The following miscellaneous provisions are a part of this Agreement:

Amendments. This Agreement, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Agreement. No alteration of or amendment to this Agreement shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.

Attorneys' Fees; Expenses. Grantor agrees to pay upon demand all of Lender's costs and expenses, including Lender's reasonable attorneys' fees and Lender's legal expenses, incurred in connection with the enforcement of this Agreement. Lender may hire or pay someone else to help enforce this Agreement, and Grantor shall pay the costs and expenses of such enforcement. Costs and expenses include Lender's reasonable attorneys' fees and legal expenses whether or not there is a lawsuit, including reasonable attorneys' fees and legal expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals, and any anticipated post-judgment collection services. Grantor also shall pay all court costs and such additional fees as may be directed by the court.

Caption Headings. Caption headings in this Agreement are for convenience purposes only and are not to be used to interpret or define the provisions of this Agreement.

Governing Law. This Agreement will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of Idaho without regard to its conflicts of law provisions. This Agreement has been accepted by Lender in the State of Idaho.

No Waiver by Lender. Lender shall not be deemed to have waived any rights under this Agreement unless such waiver is given in writing and signed by Lender. No delay or omission on the part of Lender in exercising any right shall operate as a waiver of such right or any other right. A waiver by Lender of a provision of this Agreement shall not prejudice or constitute a waiver of Lender's right otherwise to demand strict compliance with that provision or any other provision of this Agreement. No prior waiver by Lender, nor any course of dealing between Lender and Grantor, shall constitute a waiver of any of Lender's rights or of any of Grantor's obligations as to any future transactions. Whenever the consent of Lender is required under this Agreement, the granting of such consent by Lender in any instance shall not constitute continuing consent to subsequent instances where such consent is required and in all cases such consent may be granted or withheld in the sole discretion of Lender.

Notices. Any notice required to be given under this Agreement shall be given in writing, and shall be effective when actually delivered, when actually received by telefacsimile (unless otherwise required by law), when deposited with a nationally recognized overnight courier, or, if mailed, when deposited in the United States mail, as first class, certified or registered mail postage prepaid, directed to the addresses shown near the beginning of this Agreement. Any party may change its address for notices under this Agreement by giving formal written notice to the other parties, specifying that the purpose of the notice is to change the party's address. For notice purposes, Grantor agrees to keep Lender informed at all times of Grantor's current address. Unless otherwise provided or required by law, if there is more than one Grantor, any notice given by Lender to any Grantor is deemed to be notice given to all Grantors.

Power of Attorney. Grantor hereby appoints Lender as Grantor's irrevocable attorney-in-fact for the purpose of executing any documents necessary to perfect, amend, or to continue the security interest granted in this Agreement or to demand termination of filings of other secured parties. Lender may at any time, and without further authorization from Grantor, file a carbon, photographic or other reproduction of any financing statement or of this Agreement for use as a financing statement. Grantor will reimburse Lender for all expenses for the perfection and the continuation of the perfection of Lender's security interest in the Collateral.

Severability. If a court of competent jurisdiction finds any provision of this Agreement to be illegal, invalid, or unenforceable as to any circumstance, that finding shall not make the offending provision illegal, invalid, or unenforceable as to any other circumstance. If feasible, the offending provision shall be considered modified so that it becomes legal, valid and enforceable. If the offending provision cannot be so modified, it shall be considered deleted from this Agreement. Unless otherwise required by law, the illegality, invalidity, or unenforceability of any provision of this Agreement shall not affect the legality, validity or enforceability of any other provision of this Agreement.

Successors and Assigns. Subject to any limitations stated in this Agreement on transfer of Grantor's interest, this Agreement shall be binding upon and inure to the benefit of the parties, their successors and assigns. If ownership of the Collateral becomes vested in a person other than Grantor, Lender, without notice to Grantor, may deal with Grantor's successors with reference to this Agreement and the indebtedness by way of forbearance or extension without releasing Grantor from the obligations of this Agreement or liability under the indebtedness.

Survival of Representations and Warranties. All representations, warranties, and agreements made by Grantor in this Agreement shall survive the execution and delivery of this Agreement, shall be continuing in nature, and shall remain in full force and effect until such time as Grantor's indebtedness shall be paid in full.

Time is of the Essence. Time is of the essence in the performance of this Agreement.

Waive Jury. All parties to this Agreement hereby waive the right to any jury trial in any action, proceeding, or counterclaim brought by any party against any other party.

DEFINITIONS. The following capitalized words and terms shall have the following meanings when used in this Agreement. Unless specifically stated to the contrary, all references to dollar amounts shall mean amounts in lawful money of the United States of America. Words and terms used in the singular shall include the plural, and the plural shall include the singular, as the context may require. Words and terms not otherwise defined in this Agreement shall have the meanings attributed to such terms in the Uniform Commercial Code:

Agreement. The word "Agreement" means this Commercial Security Agreement, as this Commercial Security Agreement may be amended or modified from time to time, together with all exhibits and schedules attached to this Commercial Security Agreement from time to time.

Borrower. The word "Borrower" means Tri-Steel Construction Company, Inc. and includes all co-signers and co-makers signing the Note and all their successors and assigns.

Collateral. The word "Collateral" means all of Grantor's right, title and interest in and to all the Collateral as described in the Collateral Description section of this Agreement.

Default. The word "Default" means the Default set forth in this Agreement in the section titled "Default".

Environmental Laws. The words "Environmental Laws" mean any and all state, federal and local statutes, regulations and ordinances

**COMMERCIAL SECURITY AGREEMENT
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relating to the protection of human health or the environment, including without limitation the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. Section 9601, et seq. ("CERCLA"), the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 ("SARA"), the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801, et seq., the Resource Conservation and Recovery Act, 42 U.S.C. Section 6901, et seq., or other applicable state or federal laws, rules, or regulations adopted pursuant thereto.

Event of Default. The words "Event of Default" mean any of the events of default set forth in this Agreement in the default section of this Agreement.

Grantor. The word "Grantor" means Tri-Steel Construction Company, Inc..

Guarantor. The word "Guarantor" means any guarantor, surety, or accommodation party of any or all of the Indebtedness.

Guaranty. The word "Guaranty" means the guaranty from Guarantor to Lender, including without limitation a guaranty of all or part of the Note.

Hazardous Substances. The words "Hazardous Substances" mean materials that, because of their quantity, concentration or physical, chemical or infectious characteristics, may cause or pose a present or potential hazard to human health or the environment when improperly used, treated, stored, disposed of, generated, manufactured, transported or otherwise handled. The words "Hazardous Substances" are used in their very broadest sense and include without limitation any and all hazardous or toxic substances, materials or waste as defined by or listed under the Environmental Laws. The term "Hazardous Substances" also includes, without limitation, petroleum and petroleum by-products or any fraction thereof and asbestos.

Indebtedness. The word "Indebtedness" means the indebtedness evidenced by the Note or Related Documents, including all principal and interest together with all other indebtedness and costs and expenses for which Grantor is responsible under this Agreement or under any of the Related Documents. Specifically, without limitation, Indebtedness includes all amounts that may be indirectly secured by the Cross-Collateralization provision of this Agreement.

Lender. The word "Lender" means KeyBank National Association, its successors and assigns.

Note. The word "Note" means the Note executed by Tri-Steel Construction Company, Inc. in the principal amount of \$150,000.00 dated December 5, 2008, together with all renewals of, extensions of, modifications of, refinancings of, consolidations of, and substitutions for the note or credit agreement.

Property. The word "Property" means all of Grantor's right, title and interest in and to all the Property as described in the "Collateral Description" section of this Agreement.

Real Property. The words "Real Property" mean the real property, interests and rights, as further described in this Agreement.

Related Documents. The words "Related Documents" mean all promissory notes, credit agreements, loan agreements, environmental agreements, guaranties, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness.

GRANTOR HAS READ AND UNDERSTOOD ALL THE PROVISIONS OF THIS COMMERCIAL SECURITY AGREEMENT AND AGREES TO ITS TERMS. THIS AGREEMENT IS DATED DECEMBER 5, 2008.

GRANTOR:

TRI-STEEL CONSTRUCTION COMPANY, INC.

By:



Dean L. Palmer, President of Tri-Steel Construction Company, Inc.

By:



Ludean Palmer, Secretary of Tri-Steel Construction Company, Inc.

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UCC FINANCING STATEMENT

ELECTRONIC FILING*

A. NAME, PHONE, EMAIL, FAX OF CONTACT AT FILER: WILLIAM C. COLE 208-388-1200 billcole@givenspursley.com 208-388-1300				IDAHO SECRETARY OF STATE 02/23/2010 10:18 \$3.00 Filing Number: B 2010-1075267-4	
B. SEND ACKNOWLEDGMENT TO: (Name and Address) GIVENS PURSLEY, LLP 601 WEST BANNOCK BOISE, ID				THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY	
1. DEBTOR'S EXACT FULL LEGAL NAME: - insert only one debtor name (1a or 1b) - do not abbreviate or combine names					
1a. ORGANIZATION'S NAME:					
OR					
1b. LAST NAME: TRI-STEEL CONSTRUCTION COMPANY, INC.		FIRST NAME:		MIDDLE NAME:	
1c. MAILING ADDRESS: 1305 S. 12TH WEST		CITY: REXBURG		STATE: POSTAL CODE: ID 83340	
1d. TYPE OF ORG: 1. TAX ID #: SSN OR TIN		1f. JURISDICTION OF ORG:		1g. ORGANIZATIONAL ID #: (if any)	
3. SECURED PARTY'S NAME: (or NAME OF TOTAL ASSIGNEE of ASSIGNOR S/P) - insert only one secured party name (3a or 3b)					
3a. ORGANIZATION'S NAME: KEYBANK NATIONAL ASSOCIATION					
OR					
3b. LAST NAME:		FIRST NAME:		MIDDLE NAME:	
3c. MAILING ADDRESS: 702 W. IDAHO		CITY: BOISE		STATE: POSTAL CODE: ID 83702	
4. This FINANCING STATEMENT covers the following collateral: ALL INVENTORY, EQUIPMENT, ACCOUNTS (INCLUDING BUT NOT LIMITED TO ALL HEALTH-CARE INSURANCE RECEIVABLES), CHATTEL PAPER, INSTRUMENTS (INCLUDING BUT NOT LIMITED TO PROMISSORY NOTES), LETTER-OF-CREDIT RIGHTS, LETTERS OF CREDIT, DOCUMENTS, DEPOSIT ACCOUNTS, INVESTMENT PROPERTY, MONEY, OTHER RIGHTS TO PAYMENT AND PERFORMANCE, AND GENERAL INTANGIBLES (INCLUDING BUT NOT LIMITED TO SOFTWARE AND ALL PAYMENT INTANGIBLES); ALL OIL, GAS AND OTHER MINERALS BEFORE EXTRACTION; ALL OIL, GAS, OTHER MINERALS AND ACCOUNTS CONSTITUTING AS-EXTRACTED COLLATERAL; ALL FIXTURES; ALL TIMBER TO BE CUT; ALL ATTACHMENTS, ACCESSIONS, ACCESSORIES, FITTINGS, INCREASES, TOOLS, PARTS, REPAIRS, SUPPLIES AND COMMINGLED GOODS RELATED TO THE FOREGOING PROPERTY, AND ALL ADDITIONS, REPLACEMENTS OF AND SUBSTITUTIONS FOR ALL OR ANY PART OF THE FOREGOING PROPERTY; ALL INSURANCE REFUNDS RELATING TO THE FOREGOING PROPERTY, AND ALL EQUIPMENT, INVENTORY AND SOFTWARE TO UTILIZE, CREATE, MAINTAIN AND PROCESS ANY SUCH RECORDS AND DATA ON ELECTRONIC MEDIA; AND ALL SUPPORTING OBLIGATIONS RELATING TO THE FOREGOING PROPERTY; ALL WHETHER NOW EXISTING OR HEREAFTER ARISING, WHETHER NOW OWNED OR HEREAFTER ACQUIRED OR WHETHER NOW OR HEREAFTER SUBJECT TO ANY RIGHTS IN THE FOREGOING PROPERTY; AND ALL PRODUCTS AND PROCEEDS (INCLUDING BUT NOT LIMITED TO ALL INSURANCE PAYMENTS) OF OR RELATING TO THE FOREGOING PROPERTY.					
5. ALTERNATIVE DESIGNATION (if applicable): [] LESSEE/LESSOR [] CONSIGNEE/CONSIGNOR [] BAILEE/BAILOR [] SELLER/BUYER					
6. [] This FINANCING STATEMENT is to be filed (for record) (or recorded) in the REAL ESTATE RECORDS. Attach Addendum (if applicable)				7. Check to REQUEST SEARCH REPORT(S) on Debtor(s) (ADDITIONAL FEE) (optional) [] All Debtors [] Debtor 1 [] Debtor 2	
8. OPTIONAL FILER REFERENCE DATA: 5602420491					

*Electronically generated from original XML Document

GIVENS PURSLEY LLP

LAW OFFICES
601 W. Bannock Street
PO Box 2720, Boise, Idaho 83701
TELEPHONE: 208 388-1200
FACSIMILE: 208 388-1300
WEBSITE: www.givenspursley.com

EMAIL: ted@givenspursley.com

Gary G. Allen	Steven J. Hippler	Deborah E. Nelson
Peter G. Barton	Donald E. Knickrehm	Kelsey J. Nunez
Christopher J. Beeson	Debra K. Kristensen	W. Hugh O'Riordan, LL.M.
Clint R. Bolinder	Anne C. Kunkel	Angela M. Reed
Erik J. Bolinder	Michael P. Lawrence	Justin A. Steiner
Jeremy C. Chou	Franklin G. Lee	Conley E. Ward
William C. Cole	David R. Lombardi	Robert B. White
Michael C. Creamer	Emily L. McClure	
Amber N. Dina	Kenneth R. McClure	
Elizabeth M. Donick	Kelly Greene McConnell	
Kristin Bjorkman Dunn	Cynthia A. Melillo	
Thomas E. Dvorak	Christopher H. Meyer	RETIRED
Jeffrey C. Fereday	L. Edward Miller	Kenneth L. Pursley
Justin M. Frodin	Patrick J. Miller	James A. McClure
Martin C. Hendrickson	Judson B. Montgomery	Raymond D. Givens (1917-2008)

April 28, 2010

Via Facsimile

Bryan D. Smith
Smith Driscoll & Associates, PLLC
414 Shoup Avenue
P.O. Box 50731
Idaho Falls, ID 83405-0731

Re: *PAL I, LLC v. Palmer*
Our File: 10894-2

Dear Mr. Smith:

This firm represents KeyBank in a lawsuit which has been filed against Dean Palmer and Tri Steel Construction Company (copy of complaint enclosed). It has come to our attention that you have caused the Madison County Sheriff to serve a Writ of Execution and a Notice of Attachment in the above-referenced case on the following property belonging to Tri-Steel:

Catwalks/Scaffolding
1 Sky Track Forklift
1 Sky Track Forklift
Two used screw guns
Electrical cords
Desks
Chairs
Computers.

As you can see from the enclosed UCC filing, KeyBank has perfected its security interest in all of this collateral described in the KeyBank Complaint. This UCC is on file under the name of the debtor, so I am having a difficult time understanding why you would instruct the Sheriff to seize property that clearly is subject to another creditor's secured interest. Indeed, when you

Bryan D. Smith
April 28, 2010
Page 2

review the allegations in the attached Complaint, you can readily see there is no equity remaining in this property.

It is understood that two other secured creditors may claim senior interests in the forklifts. KeyBank takes no position hereby on the validity of or priority of their claims to the forklifts; however, KeyBank still has standing, even if its lien in the forklifts is junior to other liens, to assert that the debtors have no equity in the forklifts for you to attach on behalf of your judgment creditors.

Please be advised that KeyBank takes the position that said property cannot be sold without permission of KeyBank and that if any sale of such property occurs or has occurred, KeyBank will retain all rights it has in the collateral, including a right to have the security interest transfer to the proceeds of such sale.

Please advise immediately if you will acknowledge and accept that there is no equity in the collateral described above for your judgment creditor to apply to satisfy the judgment in your case. If you cause KeyBank to have to take further steps to act to protect its collateral, such as having to appear in your case, KeyBank will likely seek an award of costs and fees against your client.

Regards,



Thomas E. Dvorak

TED:slc

Enclosure

cc: Madison County Sheriff's Department, Civil Division (via facsimile)
Bill Cole
Judy Johns (via e-mail)
Dean Palmer (via U.S. Mail)

854943_1

RECEIVED

Thomas E. Dvorak (Idaho State Bar ID# 5043)

William C. Cole (Idaho State Bar ID# 4883)

GIVENS PURSLEY LLP

601 West Bannock Street

Post Office Box 2720

Boise, Idaho 83701-2720

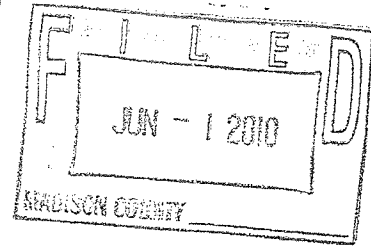
Telephone: 208-388-1200

Facsimile: 208-388-1300

846702_1 (10894-2)

JUN 03 2010

Givens Pursley, LLP



Attorneys for KeyBank National Association

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT FOR THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION, a
national banking association,

Plaintiffs,

v.

TRI-STEEL CONSTRUCTION COMPANY,
INC., an Idaho corporation; DEAN L. PALMER
and LUDEAN PALMER, husband and wife;
DUSTIN PALMER and CANDICE PALMER,
husband and wife; STEELLINE LLC, an Idaho
limited liability company,

Defendants.

Case No. CV-10-191

DEFAULT JUDGMENT

WHEREAS, Defendants Tri-Steel Construction Company, Inc., and Steelline LLC have
been regularly served with the Complaint in this matter;

WHEREAS Defendants have failed to plead or otherwise defend as required by the Idaho
Rules of Civil Procedure;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The Default of Defendants Tri-Steel Construction Company, Inc., and Steelline LLC (collectively the "Defaulting Defendants") shall be entered by the Clerk of the Court in accordance with the law;

2. Judgment is hereby entered in favor of Plaintiff KeyBank National Association against Defendants Tri-Steel Construction Company, Inc. and Steelline LLC on all counts in Plaintiff's Complaint.

3. The Defaulting Defendants are jointly and severally liable to Plaintiff in the amount of \$296,500.74 as of April 20, 2010, plus interest on said amount at the per diem rate of \$51.73 per day until the date of entry of this judgment and then from and after the date of judgment at the judgment rate of 5.625%.

4. An additional amount is awarded jointly and severally as against these Defaulting Defendants for costs and attorneys' fees in the amount \$9,349.05, plus interest thereafter at the judgment rate as specified above from and after the date of judgment.

5. Pursuant to Idaho Code Section 8-301, *et. seq.*, KeyBank is entitled to a Writ of Possession as against Tri-Steel Construction Company, Inc. directing the Sheriff

- a. to put KeyBank in possession of the 2007 Collateral and the 2008 Collateral as defined in the Complaint on file in this matter;
- b. Authorizing the Sheriff to take possession of said Collateral wherever it may be found and to make such entry upon real property as may be necessary to secure the possession of said Collateral;
- c. Commanding the Sheriff to keep the aforesaid Collateral in a secure place and deliver it to KeyBank upon the payment of reasonably incurred fees and expenses incurred in seizing the property; and

- d. Authorizing KeyBank, upon its receipt of possession of said collateral, to utilize its non-judicial remedies under the Uniform Commercial Code with respect to such property.

DATED this 27 day of May, 2010.

/s/ Gregory W. Moeller
The Honorable Gregory W. Moeller
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 1 day of June, 2010, I caused to be served a true and correct copy of the foregoing document to the persons listed below the method indicated:

Thomas E. Dvorak
Givens Pursley LLP
P.O. Box 2720
Boise, ID 83701

☐ Hand Delivery
☐ Facsimile
☐ Overnight Courier
☒ U.S. Mail

Dustin and Candice Palmer
591 Twisted Willow Road
Rexburg, ID 83440

☐ Hand Delivery
☐ Facsimile
☐ Overnight Courier
☒ U.S. Mail

Tri-Steel Construction Company, Inc.
1305 S 12th W
Rexburg, ID 83440

☐ Hand Delivery
☐ Facsimile
☐ Overnight Courier
☒ U.S. Mail

Dean L. Palmer and LuDean Palmer
1305 S 12th W
Rexburg, ID 83440

☐ Hand Delivery
☐ Facsimile
☐ Overnight Courier
☒ U.S. Mail

Steelline LLC
1305 S 12th W
Rexburg, ID 83440

☐ Hand Delivery
☐ Facsimile
☐ Overnight Courier
☒ U.S. Mail



GIVENS PURSLEY LLP

LAW OFFICES
601 W. Bannock Street
PO Box 2720, Boise, Idaho 83701
TELEPHONE: 208 388-1200
FACSIMILE: 208 388-1300
WEBSITE: www.givenspursley.com

Gary G. Allen	Steven J. Hippler	Deborah E. Nelson
Peter G. Barton	Donald E. Knickrehm	Kelsey J. Nunez
Christopher J. Beeson	Debora K. Kristensen	W. Hugh O'Riordan, LL.M.
Clint R. Bolinder	Anne C. Kunkel	Angela M. Reed
Erin J. Bolinder	Michael P. Lawrence	Justin A. Steiner
Jeremy C. Chou	Franklin G. Lee	Conley E. Ward
William C. Cole	David R. Lombardi	Robert B. White
Michael C. Creamer	Emily L. McClure	
Amber N. Dina	Kenneth R. McClure	
Elizabeth M. Donick	Kelly Greene McConnell	
Kristin Bjorkman Dunn	Cynthia A. Meilillo	
Thomas F. Dvorak	Christopher H. Meyer	RETIRED
Jeffrey C. Fereday	L. Edward Miller	Kenneth L. Pursley
Justin M. Fredin	Patrick J. Miller	James A. McClure
Martin C. Hendrickson	Judson B. Montgomery	Raymond D. Givers (1917-2008)

June 8, 2010

Via Facsimile

Madison County Sheriff, Civil Division
Attn: Sue Bagley
145 E. Main Street
Rexburg, ID 83440

Re: *KeyBank National Association v. Tri-Steel Construction Company*
Case No. CV-2010-0000191
Our File: 10894-2

Dear Ms. Bagley:

The following instructions amend and supplement the prior instructions for the Writ of Execution on behalf of Plaintiff Keybank National Association in the above-referenced matter.

As we discussed today, and pursuant to the enclosed Security Agreement and UCC filing, KeyBank has a perfected security interest the personal property of Tri-Steel Construction Company that is scheduled for sale on June 9, 2010 at 10:00 a.m. Notably, KeyBank also has a perfected security interest in all proceeds from the sale of the property. See Security Agreement, p. 1, Collateral Description (D) ("All proceeds . . . from the sale, destruction, loss or other disposition of any of the property described in this Collateral section . . .").

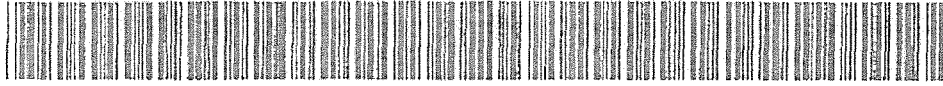
Therefore, KeyBank requests that you postpone the sale for one week until the creditors have time to obtain a court order regarding the distribution of proceeds. If you choose to proceed with the sale, please hold all the sale proceeds in a trust account until you receive a court order instructing their distribution.

Sincerely,



Amber N. Dina

Enclosures
890118-1



5656024204912382550070E40

COMMERCIAL SECURITY AGREEMENT

Principal	Loan Date	Maturity	Loan No	Coll Coll	Account	Officer	Initials
\$150,000.00	04-16-2007	04-16-2014	2382555007	402/326	N5602420491	JEH28	

References in the shaded area are for Lender's use only and do not limit the applicability of this document to any particular loan or item. Any item above containing " " has been omitted due to text length limitations.

Grantor: Tri-Steel Construction Company, Inc.
1305 S 12th W
Rexburg, ID 83440

Lender: KeyBank National Association
ID-88-Rexburg
110 E. Main Street
Rexburg, ID 83440

THIS COMMERCIAL SECURITY AGREEMENT dated April 16, 2007, is made and executed between Tri-Steel Construction Company, Inc. ("Grantor") and KeyBank National Association ("Lender").

GRANT OF SECURITY INTEREST. For valuable consideration, Grantor grants to Lender a security interest in the Collateral to secure the indebtedness and agrees that Lender shall have the rights stated in this Agreement with respect to the Collateral, in addition to all other rights which Lender may have by law.

COLLATERAL DESCRIPTION The word "Collateral" as used in this Agreement means the following described property, whether now owned or hereafter acquired, whether now existing or hereafter arising, and wherever located, in which Grantor is giving to Lender a security interest for the payment of the indebtedness and performance of all other obligations under the Note and this Agreement:

All inventory, equipment, accounts (including but not limited to all health-care-insurance receivables), chattel paper, instruments (including but not limited to all promissory notes), letter-of-credit rights, letters of credit, documents, deposit accounts, investment property, money, other rights to payment and performance, and general intangibles (including but not limited to all software and all payment intangibles); all oil, gas and other minerals before extraction; all oil, gas, other minerals and accounts constituting as-extracted collateral; all fixtures; all timber to be cut; all attachments, accessions, accessories, fittings, increases, tools, parts, repairs, supplies, and commingled goods relating to the foregoing property, and all additions, replacements of and substitutions for all or any part of the foregoing property; all insurance refunds relating to the foregoing property; all good will relating to the foregoing property; all records and data and embedded software relating to the foregoing property, and all equipment, inventory and software to utilize, create, maintain and process any such records and data on electronic media; and all supporting obligations relating to the foregoing property; all whether now existing or hereafter arising, whether now owned or hereafter acquired or whether now or hereafter subject to any rights in the foregoing property; and all products and proceeds (including but not limited to all insurance payments) of or relating to the foregoing property.

In addition, the word "Collateral" also includes all the following, whether now owned or hereafter acquired, whether now existing or hereafter arising, and wherever located

- (A) All accessions, attachments, accessories, tools, parts, supplies, replacements of and additions to any of the collateral described herein, whether added now or later
- (B) All products and produce of any of the property described in this Collateral section.
- (C) All accounts, general intangibles, instruments, rents, monies, payments, and all other rights, arising out of a sale, lease, consignment or other disposition of any of the property described in this Collateral section
- (D) All proceeds (including insurance proceeds) from the sale, destruction, loss, or other disposition of any of the property described in this Collateral section, and sums due from a third party who has damaged or destroyed the Collateral or from that party's insurer, whether due to judgment, settlement or other process.
- (E) All records and data relating to any of the property described in this Collateral section, whether in the form of a writing, photograph, microfilm, microfiche, or electronic media, together with all of Grantor's right, title, and interest in and to all computer software required to utilize, create, maintain, and process any such records or data on electronic media

CROSS-COLLATERALIZATION. In addition to the Note, this Agreement secures all obligations, debts and liabilities, plus interest thereon, of Grantor to Lender, or any one or more of them, as well as all claims by Lender against Grantor or any one or more of them, whether now existing or hereafter arising, whether related or unrelated to the purpose of the Note, whether voluntary or otherwise, whether due or not due, direct or indirect, determined or undetermined, absolute or contingent, liquidated or unliquidated, whether Grantor may be liable individually or jointly with others, whether obligated as guarantor, surety, accommodation party or otherwise, and whether recovery upon such amounts may be or hereafter may become barred by any statute of limitations, and whether the obligation to repay such amounts may be or hereafter may become otherwise unenforceable.

RIGHT OF SETOFF. To the extent permitted by applicable law, Lender reserves a right of setoff in all Grantor's accounts with Lender (whether checking, savings, or some other account). This includes all accounts Grantor holds jointly with someone else and all accounts Grantor may open in the future. However, this does not include any IRA or Keogh accounts, or any trust accounts for which setoff would be prohibited by law. Grantor authorizes Lender, to the extent permitted by applicable law, to charge or setoff all sums owing on the indebtedness against any and all such accounts

GRANTOR'S REPRESENTATIONS AND WARRANTIES WITH RESPECT TO THE COLLATERAL. With respect to the Collateral, Grantor represents and promises to Lender that

Perfection of Security Interest. Grantor agrees to take whatever actions are requested by Lender to perfect and continue Lender's security interest in the Collateral. Upon request of Lender, Grantor will deliver to Lender any and all of the documents evidencing or constituting the Collateral, and Grantor will note Lender's interest upon any and all chattel paper and instruments if not delivered to Lender for possession by Lender. This is a continuing Security Agreement and will continue in effect even though all or any part of the indebtedness is paid in full and even though for a period of time Grantor may not be indebted to Lender.

Notice to Lender. Grantor will promptly notify Lender in writing at Lender's address shown above (or such other addresses as Lender may designate) of (1) change in Grantor's name; (2) change in Grantor's assumed business name(s); (3) change

COMMERCIAL SECURITY AGREEMENT (Continued)

Loan No: 2382656007

Page 2

in the management of the Corporation Grantor, (4) change in the authorized signer(s), (5) change in Grantor's principal office address; (6) change in Grantor's state of organization, (7) conversion of Grantor to a new or different type of business entity; or (8) change in any other aspect of Grantor that directly or indirectly relates to any agreements between Grantor and Lender. No change in Grantor's name or state of organization will take effect until after Lender has received notice.

No Violation. The execution and delivery of this Agreement will not violate any law or agreement governing Grantor or to which Grantor is a party, and its certificate or articles of incorporation and bylaws do not prohibit any term or condition of this Agreement.

Enforceability of Collateral. To the extent the Collateral consists of accounts, chattel paper, or general intangibles, as defined by the Uniform Commercial Code, the Collateral is enforceable in accordance with its terms, is genuine, and fully complies with all applicable laws and regulations concerning form, content and manner of preparation and execution, and all persons appearing to be obligated on the Collateral have authority and capacity to contract and are in fact obligated as they appear to be on the Collateral. At the time any account becomes subject to a security interest in favor of Lender, the account shall be a good and valid account representing an undisputed, bona fide indebtedness incurred by the account debtor, for merchandise held subject to delivery instructions or previously shipped or delivered pursuant to a contract of sale, or for services previously performed by Grantor with or for the account debtor. So long as this Agreement remains in effect, Grantor shall not, without Lender's prior written consent, compromise, settle, adjust, or extend payment under or with regard to any such Accounts. There shall be no setoffs or counterclaims against any of the Collateral, and no agreement shall have been made under which any deductions or discounts may be claimed concerning the Collateral except those disclosed to Lender in writing.

Location of the Collateral. Except in the ordinary course of Grantor's business, Grantor agrees to keep the Collateral (or to the extent the Collateral consists of intangible property such as accounts or general intangibles, the records concerning the Collateral) at Grantor's address shown above or at such other locations as are acceptable to Lender. Upon Lender's request, Grantor will deliver to Lender in form satisfactory to Lender a schedule of real properties and Collateral locations relating to Grantor's operations, including without limitation the following: (1) all real property Grantor owns or is purchasing, (2) all real property Grantor is renting or leasing, (3) all storage facilities Grantor owns, rents, leases, or uses, and (4) all other properties where Collateral is or may be located.

Removal of the Collateral. Except in the ordinary course of Grantor's business, including the sales of inventory, Grantor shall not remove the Collateral from its existing location without Lender's prior written consent. To the extent that the Collateral consists of vehicles, or other titled property, Grantor shall not take or permit any action which would require application for certificates of title for the vehicles outside the State of Idaho, without Lender's prior written consent. Grantor shall, whenever requested, advise Lender of the exact location of the Collateral.

Transactions Involving Collateral. Except for inventory sold or accounts collected in the ordinary course of Grantor's business, or as otherwise provided for in this Agreement, Grantor shall not sell, offer to sell, or otherwise transfer or dispose of the Collateral. While Grantor is not in default under this Agreement, Grantor may sell inventory, but only in the ordinary course of its business and only to buyers who qualify as a buyer in the ordinary course of business. A sale in the ordinary course of Grantor's business does not include a transfer in partial or total satisfaction of a debt or any bulk sale. Grantor shall not pledge, mortgage, encumber or otherwise permit the Collateral to be subject to any lien, security interest, encumbrance, or charge, other than the security interest provided for in this Agreement, without the prior written consent of Lender. This includes security interests even if junior in right to the security interests granted under this Agreement. Unless waived by Lender, all proceeds from any disposition of the Collateral (for whatever reason) shall be held in trust for Lender and shall not be commingled with any other funds; provided however, this requirement shall not constitute consent by Lender to any sale or other disposition. Upon receipt, Grantor shall immediately deliver any such proceeds to Lender.

Title. Grantor represents and warrants to Lender that Grantor holds good and marketable title to the Collateral, free and clear of all liens and encumbrances except for the lien of this Agreement. No financing statement covering any of the Collateral is on file in any public office other than those which reflect the security interest created by this Agreement or to which Lender has specifically consented. Grantor shall defend Lender's rights in the Collateral against the claims and demands of all other persons.

Repairs and Maintenance. Grantor agrees to keep and maintain, and to cause others to keep and maintain, the Collateral in good order, repair and condition at all times while this Agreement remains in effect. Grantor further agrees to pay when due all claims for work done on, or services rendered or material furnished in connection with the Collateral so that no lien or encumbrance may ever attach to or be filed against the Collateral.

Inspection of Collateral. Lender and Lender's designated representatives and agents shall have the right at all reasonable times to examine and inspect the Collateral wherever located.

Taxes, Assessments and Liens. Grantor will pay when due all taxes, assessments and liens upon the Collateral, its use or operation, upon this Agreement, upon any promissory note or notes evidencing the Indebtedness, or upon any of the other Related Documents. Grantor may withhold any such payment or may elect to contest any lien if Grantor is in good faith conducting an appropriate proceeding to contest the obligation to pay and so long as Lender's interest in the Collateral is not jeopardized in Lender's sole opinion. If the Collateral is subjected to a lien which is not discharged within fifteen (15) days, Grantor shall deposit with Lender cash, a sufficient corporate surety bond or other security satisfactory to Lender in an amount adequate to provide for the discharge of the lien plus any interest, costs, reasonable attorneys' fees or other charges that could accrue as a result of foreclosure or sale of the Collateral. In any contest Grantor shall defend itself and Lender and shall satisfy any final adverse judgment before enforcement against the Collateral. Grantor shall name Lender as an additional obligee under any surety bond furnished in the contest proceedings. Grantor further agrees to furnish Lender with evidence that such taxes, assessments, and governmental and other charges have been paid in full and in a timely manner. Grantor may withhold any such payment or may elect to contest any lien if Grantor is in good faith conducting an appropriate proceeding to contest the obligation to pay and so long as Lender's interest in the Collateral is not jeopardized.

Compliance with Governmental Requirements. Grantor shall comply promptly with all laws, ordinances, rules and regulations of all governmental authorities, now or hereafter in effect, applicable to the ownership, production, disposition, or use of the Collateral, including all laws or regulations relating to the undue erosion of highly-erodible land or relating to the conversion of wetlands for the production of an agricultural product or commodity. Grantor may contest in good faith any such law, ordinance or regulation and withhold compliance during any proceeding, including appropriate appeals, so long as Lender's interest in the Collateral, in Lender's opinion, is not jeopardized.

Hazardous Substances. Grantor represents and warrants that the Collateral never has been, and never will be so long as this Agreement remains a lien on the Collateral, used in violation of any Environmental Laws or for the generation, manufacture, storage, transportation, treatment, disposal, release or threatened release of any Hazardous Substance. The representations and warranties contained herein are based on Grantor's due diligence in investigating the Collateral for Hazardous Substances. Grantor hereby (1) releases and waives any future claims against Lender for indemnity or contribution in the event Grantor becomes liable for cleanup or other costs under any Environmental Laws, and (2) agrees to indemnify, defend, and hold harmless Lender against any and all claims and losses resulting from a breach of this provision of this Agreement. This obligation to indemnify and defend shall survive the payment of the Indebtedness and the satisfaction of this Agreement.

COMMERCIAL SECURITY AGREEMENT (Continued)

Loan No: 2382555007

Page 3

Maintenance of Casualty Insurance. Grantor shall procure and maintain all risks insurance, including without limitation fire, theft and liability coverage together with such other insurance as Lender may require with respect to the Collateral, in form, amounts, coverages and basis reasonably acceptable to Lender and issued by a company or companies reasonably acceptable to Lender. Grantor, upon request of Lender, will deliver to Lender from time to time the policies or certificates of insurance in form satisfactory to Lender, including stipulations that coverages will not be cancelled or diminished without at least ten (10) days' prior written notice to Lender and not including any disclaimer of the insurer's liability for failure to give such a notice. Each insurance policy also shall include an endorsement providing that coverage in favor of Lender will not be impaired in any way by any act, omission or default of Grantor or any other person. In connection with all policies covering assets in which Lender holds or is offered a security interest, Grantor will provide Lender with such loss payable or other endorsements as Lender may require. If Grantor at any time fails to obtain or maintain any insurance as required under this Agreement, Lender may (but shall not be obligated to) obtain such insurance as Lender deems appropriate, including if Lender so chooses "single interest insurance," which will cover only Lender's interest in the Collateral.

Application of Insurance Proceeds. Grantor shall promptly notify Lender of any loss or damage to the Collateral if the estimated cost of repair or replacement exceeds \$500.00, whether or not such casualty or loss is covered by insurance. Lender may make proof of loss if Grantor fails to do so within fifteen (15) days of the casualty. All proceeds of any insurance on the Collateral, including accrued proceeds thereon, shall be held by Lender as part of the Collateral. If Lender consents to repair or replacement of the damaged or destroyed Collateral, Lender shall, upon satisfactory proof of expenditure, pay or reimburse Grantor from the proceeds for the reasonable cost of repair or restoration. If Lender does not consent to repair or replacement of the Collateral, Lender shall retain a sufficient amount of the proceeds to pay all of the indebtedness, and shall pay the balance to Grantor. Any proceeds which have not been disbursed within six (6) months after their receipt and which Grantor has not committed to the repair or restoration of the Collateral shall be used to prepay the indebtedness.

Insurance Reserves. Lender may require Grantor to maintain with Lender reserves for payment of insurance premiums, which reserves shall be created by monthly payments from Grantor of a sum estimated by Lender to be sufficient to produce, at least fifteen (15) days before the premium due date, amounts at least equal to the insurance premiums to be paid. If fifteen (15) days before payment is due, the reserve funds are insufficient, Grantor shall upon demand pay any deficiency to Lender. The reserve funds shall be held by Lender as a general deposit and shall constitute a non-interest-bearing account which Lender may satisfy by payment of the insurance premiums required to be paid by Grantor as they become due. Lender does not hold the reserve funds in trust for Grantor, and Lender is not the agent of Grantor for payment of the insurance premiums required to be paid by Grantor. The responsibility for the payment of premiums shall remain Grantor's sole responsibility.

Insurance Reports. Grantor, upon request of Lender, shall furnish to Lender reports on each existing policy of insurance showing such information as Lender may reasonably request including the following: (1) the name of the insurer; (2) the risks insured; (3) the amount of the policy; (4) the property insured; (5) the then current value on the basis of which insurance has been obtained and the manner of determining that value; and (6) the expiration date of the policy. In addition, Grantor shall upon request by Lender (however not more often than annually) have an independent appraiser satisfactory to Lender determine, as applicable, the cash value or replacement cost of the Collateral.

Financing Statements. Grantor authorizes Lender to file a UCC financing statement, or alternatively, a copy of this Agreement to perfect Lender's security interest. At Lender's request, Grantor additionally agrees to sign all other documents that are necessary to perfect, protect, and continue Lender's security interest in the Property. Grantor will pay all filing fees, title transfer fees, and other fees and costs involved unless prohibited by law or unless Lender is required by law to pay such fees and costs. Grantor irrevocably appoints Lender to execute documents necessary to transfer title if there is a default. Lender may file a copy of this Agreement as a financing statement. If Grantor changes Grantor's name or address, or the name or address of any person granting a security interest under this Agreement changes, Grantor will promptly notify the Lender of such change.

GRANTOR'S RIGHT TO POSSESSION AND TO COLLECT ACCOUNTS. Until default and except as otherwise provided below with respect to accounts, Grantor may have possession of the tangible personal property and beneficial use of all the Collateral and may use it in any lawful manner not inconsistent with this Agreement or the Related Documents, provided that Grantor's right to possession and beneficial use shall not apply to any Collateral where possession of the Collateral by Lender is required by law to perfect Lender's security interest in such Collateral. Until otherwise notified by Lender, Grantor may collect any of the Collateral consisting of accounts. At any time and even though no Event of Default exists, Lender may exercise its rights to collect the accounts and to notify account debtors to make payments directly to Lender for application to the indebtedness. If Lender at any time has possession of any Collateral, whether before or after an Event of Default, Lender shall be deemed to have exercised reasonable care in the custody and preservation of the Collateral if Lender takes such action for that purpose as Grantor shall request or as Lender, in Lender's sole discretion, shall deem appropriate under the circumstances, but failure to honor any request by Grantor shall not of itself be deemed to be a failure to exercise reasonable care. Lender shall not be required to take any steps necessary to preserve any rights in the Collateral against prior parties, nor to protect, preserve or maintain any security interest given to secure the indebtedness.

LENDER'S EXPENDITURES. If any action or proceeding is commenced that would materially affect Lender's interest in the Collateral or if Grantor fails to comply with any provision of this Agreement or any Related Documents, including but not limited to Grantor's failure to discharge or pay when due any amounts Grantor is required to discharge or pay under this Agreement or any Related Documents, Lender on Grantor's behalf may (but shall not be obligated to) take any action that Lender deems appropriate, including but not limited to discharging or paying all taxes, liens, security interests, encumbrances and other claims, at any time levied or placed on the Collateral and paying all costs for insuring, maintaining and preserving the Collateral. All such expenditures incurred or paid by Lender for such purposes will then bear interest at the rate charged under the Note from the date incurred or paid by Lender to the date of repayment by Grantor. All such expenses will become a part of the indebtedness and, at Lender's option, will (A) be payable on demand; (B) be added to the balance of the Note and be apportioned among and be payable with any installment payments to become due during either (1) the term of any applicable insurance policy; or (2) the remaining term of the Note; or (C) be treated as a balloon payment which will be due and payable at the Note's maturity. The Agreement also will secure payment of these amounts. Such right shall be in addition to all other rights and remedies to which Lender may be entitled upon Default.

DEFAULT. Each of the following shall constitute an Event of Default under this Agreement:

Payment Default. Grantor fails to make any payment when due under the indebtedness.

Other Defaults. Grantor fails to comply with or to perform any other term, obligation, covenant or condition contained in this Agreement or in any of the Related Documents or to comply with or to perform any term, obligation, covenant or condition contained in any other agreement between Lender and Grantor.

Default in Favor of Third Parties. Should Borrower or any Grantor default under any loan, extension of credit, security agreement, purchase or sales agreement, or any other agreement, in favor of any other creditor or person that may materially affect any of Grantor's property or Grantor's or any Grantor's ability to perform their respective obligations under this Agreement or any of the

COMMERCIAL SECURITY AGREEMENT
(Continued)

Loan No: 2382655007

Page 4

Related Documents

False Statements. Any warranty, representation or statement made or furnished to Lender by Grantor or on Grantor's behalf under this Agreement or the Related Documents is false or misleading in any material respect, either now or at the time made or furnished or becomes false or misleading at any time thereafter.

Defective Collateralization. This Agreement or any of the Related Documents ceases to be in full force and effect (including failure of any collateral document to create a valid and perfected security interest or lien) at any time and for any reason.

Insolvency. The dissolution or termination of Grantor's existence as a going business, the insolvency of Grantor, the appointment of a receiver for any part of Grantor's property, any assignment for the benefit of creditors, any type of creditor workout, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Grantor.

Creditor or Foreclosure Proceedings. Commencement of foreclosure or forfeiture proceedings, whether by judicial proceeding, self-help, repossession or any other method, by any creditor of Grantor or by any governmental agency against any collateral securing the indebtedness. This includes a garnishment of any of Grantor's accounts, including deposit accounts, with Lender. However, this Event of Default shall not apply if there is a good faith dispute by Grantor as to the validity or reasonableness of the claim which is the basis of the creditor or forfeiture proceeding and if Grantor gives Lender written notice of the creditor or forfeiture proceeding and deposits with Lender monies or a surety bond for the creditor or forfeiture proceeding, in an amount determined by Lender, in its sole discretion, as being an adequate reserve or bond for the dispute.

Events Affecting Guarantor. Any of the preceding events occurs with respect to any Guarantor of any of the indebtedness or Guarantor dies or becomes incompetent or revokes or disputes the validity of, or liability under, any Guaranty of the indebtedness.

Adverse Change. A material adverse change occurs in Grantor's financial condition, or Lender believes the prospect of payment or performance of the indebtedness is impaired.

Insecurity. Lender in good faith believes itself insecure.

Cure Provisions. If any default, other than a default in payment is curable and if Grantor has not been given a notice of a breach of the same provision of this Agreement within the preceding twelve (12) months, it may be cured if Grantor, after receiving written notice from Lender demanding cure of such default, (1) cures the default within fifteen (15) days; or (2) if the cure requires more than fifteen (15) days, immediately initiates steps which Lender deems in Lender's sole discretion to be sufficient to cure the default and thereafter continues and completes all reasonable and necessary steps sufficient to produce compliance as soon as reasonably practical.

RIGHTS AND REMEDIES ON DEFAULT. If an Event of Default occurs under this Agreement, at any time thereafter, Lender shall have all the rights of a secured party under the Idaho Uniform Commercial Code. In addition and without limitation, Lender may exercise any one or more of the following rights and remedies:

Notice of Default. In the Event of Default Lender shall execute or cause the Trustee to execute a written notice of such default and of Lender's election to cause the Property to be sold to satisfy the indebtedness, and shall cause such notice to be recorded in the office of the recorder of each county wherein the Real Property, or any part thereof, is situated.

Accelerate Indebtedness. Lender may declare the entire indebtedness, including any prepayment penalty which Grantor would be required to pay, immediately due and payable, without notice of any kind to Grantor.

Assemble Collateral. Lender may require Grantor to deliver to Lender all or any portion of the Collateral and any and all certificates of title and other documents relating to the Collateral. Lender may require Grantor to assemble the Collateral and make it available to Lender at a place to be designated by Lender. Lender also shall have full power to enter upon the property of Grantor to take possession of and remove the Collateral. If the Collateral contains other goods not covered by this Agreement at the time of repossession, Grantor agrees Lender may take such other goods, provided that Lender makes reasonable efforts to return them to Grantor after repossession.

Sell the Collateral. Lender shall have full power to sell, lease, transfer, or otherwise deal with the Collateral or proceeds thereof in Lender's own name or that of Grantor. Lender may sell the Collateral at public auction or private sale. Unless the Collateral threatens to decline speedily in value or is of a type customarily sold on a recognized market, Lender will give Grantor, and other persons as required by law, reasonable notice of the time and place of any public sale, or the time after which any private sale or any other disposition of the Collateral is to be made. However, no notice need be provided to any person who, after Event of Default occurs, enters into and authenticates an agreement waiving that person's right to notification of sale. The requirements of reasonable notice shall be met if such notice is given at least ten (10) days before the time of the sale or disposition. All expenses relating to the disposition of the Collateral, including without limitation the expenses of retaking, holding, insuring, preparing for sale and selling the Collateral, shall become a part of the indebtedness secured by this Agreement and shall be payable on demand, with interest at the Note rate from date of expenditure until repaid.

Appoint Receiver. Lender shall have the right to have a receiver appointed to take possession of all or any part of the Collateral, with the power to protect and preserve the Collateral, to operate the Collateral preceding foreclosure or sale, and to collect the Rents from the Collateral and apply the proceeds, over and above the cost of the receivership, against the indebtedness. The receiver may serve without bond if permitted by law. Lender's right to the appointment of a receiver shall exist whether or not the apparent value of the Collateral exceeds the indebtedness by a substantial amount. Employment by Lender shall not disqualify a person from serving as a receiver.

Collect Revenues, Apply Accounts. Lender, either itself or through a receiver, may collect the payments, rents, income, and revenues from the Collateral. Lender may at any time in Lender's discretion transfer any Collateral into Lender's own name or that of Lender's nominee and receive the payments, rents, income, and revenues therefrom and hold the same as security for the indebtedness or apply it to payment of the indebtedness in such order of preference as Lender may determine. Insofar as the Collateral consists of accounts, general intangibles, insurance policies, instruments, chattel paper, choses in action, or similar property, Lender may demand, collect, receipt for, settle, compromise, adjust, sue for, foreclose, or realize on the Collateral as Lender may determine, whether or not indebtedness or Collateral is then due. For these purposes, Lender may, on behalf of and in the name of Grantor, receive, open and dispose of mail addressed to Grantor, change any address to which mail and payments are to be sent; and endorse notes, checks, drafts, money orders, documents of title, instruments and items pertaining to payment, shipment, or storage of any Collateral. To facilitate collection, Lender may notify account debtors and obligors on any Collateral to make payments directly to Lender.

Obtain Deficiency. If Lender chooses to sell any or all of the Collateral, Lender may obtain a judgment against Grantor for any deficiency remaining on the indebtedness due to Lender after application of all amounts received from the exercise of the rights provided in this Agreement. Grantor shall be liable for a deficiency even if the transaction described in this subsection is a sale of accounts or chattel paper.

Other Rights and Remedies. Lender shall have all the rights and remedies of a secured creditor under the provisions of the Uniform Commercial Code, as may be amended from time to time. In addition, Lender shall have and may exercise any or all other rights and

COMMERCIAL SECURITY AGREEMENT
(Continued)

Loan No: 238255007

Page 5

Election of Remedies. Except as may be prohibited by applicable law, all of Lender's rights and remedies, whether evidenced by this Agreement, the Related Documents, or by any other writing, shall be cumulative and may be exercised singularly or concurrently. Election by Lender to pursue any remedy shall not exclude pursuit of any other remedy, and an election to make expenditures or to take action to perform an obligation of Grantor under this Agreement, after Grantor's failure to perform, shall not affect Lender's right to declare a default and exercise its remedies.

SMALL BUSINESS ADMINISTRATION SPECIAL PROVISIONS. "The Loan secured by this lien was made under a United States Small Business Administration (SBA) nationwide program which uses tax dollars to assist small business owners. If the United States is seeking to enforce this document, then under SBA regulations: a) When SBA is the holder of the Note, this document and all documents evidencing or securing this Loan will be construed in accordance with federal law. b) Lender or SBA may use local or state procedures for purposes such as filing papers, recording documents, giving notice, foreclosing liens, and other purposes. By using these procedures, SBA does not waive any federal immunity from local or state control, penalty, tax or liability. No Borrower or Guarantor may claim or assert against SBA any local or state law to deny any obligation of Borrower, or defeat any claim of SBA with respect to this Loan. Any clause in this document requiring arbitration is not enforceable when SBA is the holder of the Note secured by this instrument."

MISCELLANEOUS PROVISIONS. The following miscellaneous provisions are a part of this Agreement:

Amendments. This Agreement, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Agreement. No alteration of or amendment to this Agreement shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.

Attorneys' Fees; Expenses. Grantor agrees to pay upon demand all of Lender's costs and expenses, including Lender's reasonable attorneys' fees and Lender's legal expenses, incurred in connection with the enforcement of this Agreement. Lender may hire or pay someone else to help enforce this Agreement, and Grantor shall pay the costs and expenses of such enforcement. Costs and expenses include Lender's reasonable attorneys' fees and legal expenses whether or not there is a lawsuit, including reasonable attorneys' fees and legal expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals, and any anticipated post-judgment collection services. Grantor also shall pay all court costs and such additional fees as may be directed by the court.

Caption Headings. Caption headings in this Agreement are for convenience purposes only and are not to be used to interpret or define the provisions of this Agreement.

Governing Law. This Agreement will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of Idaho without regard to its conflicts of law provisions. This Agreement has been accepted by Lender in the State of Idaho.

No Waiver by Lender. Lender shall not be deemed to have waived any rights under this Agreement unless such waiver is given in writing and signed by Lender. No delay or omission on the part of Lender in exercising any right shall operate as a waiver of such right or any other right. A waiver by Lender of a provision of this Agreement shall not prejudice or constitute a waiver of Lender's right otherwise to demand strict compliance with that provision or any other provision of this Agreement. No prior waiver by Lender, nor any course of dealing between Lender and Grantor, shall constitute a waiver of any of Lender's rights or of any of Grantor's obligations as to any future transactions. Whenever the consent of Lender is required under this Agreement, the granting of such consent by Lender in any instance shall not constitute continuing consent to subsequent instances where such consent is required and in all cases such consent may be granted or withheld in the sole discretion of Lender.

Notices. Any notice required to be given under this Agreement shall be given in writing, and shall be effective when actually delivered, when actually received by telefacsimile (unless otherwise required by law), when deposited with a nationally recognized overnight courier, or, if mailed, when deposited in the United States mail, as first class, certified or registered mail postage prepaid, directed to the addresses shown near the beginning of this Agreement. Any party may change its address for notices under this Agreement by giving formal written notice to the other parties, specifying that the purpose of the notice is to change the party's address. For notice purposes, Grantor agrees to keep Lender informed at all times of Grantor's current address. Unless otherwise provided or required by law, if there is more than one Grantor, any notice given by Lender to any Grantor is deemed to be notice given to all Grantors.

Power of Attorney. Grantor hereby appoints Lender as Grantor's irrevocable attorney-in-fact for the purpose of executing any documents necessary to perfect, amend, or to continue the security interest granted in this Agreement or to demand termination of filings of other secured parties. Lender may at any time, and without further authorization from Grantor, file a carbon, photographic or other reproduction of any financing statement or of this Agreement for use as a financing statement. Grantor will reimburse Lender for all expenses for the perfection and the continuation of the perfection of Lender's security interest in the Collateral.

Severability. If a court of competent jurisdiction finds any provision of this Agreement to be illegal, invalid, or unenforceable as to any circumstance, that finding shall not make the offending provision illegal, invalid, or unenforceable as to any other circumstance. If feasible, the offending provision shall be considered modified so that it becomes legal, valid and enforceable. If the offending provision cannot be so modified, it shall be considered deleted from this Agreement. Unless otherwise required by law, the illegality, invalidity, or unenforceability of any provision of this Agreement shall not affect the legality, validity or enforceability of any other provision of this Agreement.

Successors and Assigns. Subject to any limitations stated in this Agreement on transfer of Grantor's interest, this Agreement shall be binding upon and inure to the benefit of the parties, their successors and assigns. If ownership of the Collateral becomes vested in a person other than Grantor, Lender, without notice to Grantor, may deal with Grantor's successors with reference to this Agreement and the indebtedness by way of forbearance or extension without releasing Grantor from the obligations of this Agreement or liability under the indebtedness.

Survival of Representations and Warranties. All representations, warranties, and agreements made by Grantor in this Agreement shall survive the execution and delivery of this Agreement, shall be continuing in nature, and shall remain in full force and effect until such time as Grantor's indebtedness shall be paid in full.

Time is of the Essence. Time is of the essence in the performance of this Agreement.

Waive Jury. All parties to this Agreement hereby waive the right to any jury trial in any action, proceeding, or counterclaim brought by any party against any other party.

DEFINITIONS. The following capitalized words and terms shall have the following meanings when used in this Agreement. Unless specifically stated to the contrary, all references to dollar amounts shall mean amounts in lawful money of the United States of America. Words and terms used in the singular shall include the plural, and the plural shall include the singular, as the context may require. Words and terms not otherwise defined in this Agreement shall have the meanings attributed to such terms in the Uniform Commercial Code.

Agreement, as this Commercial Security Agreement may be amended

COMMERCIAL SECURITY AGREEMENT
(Continued)

Loan No: 2382555007

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or modified from time to time, together with all exhibits and schedules attached to this Commercial Security Agreement from time to time.

Borrower. The word "Borrower" means Tri-Steel Construction Company, Inc. and includes all co-signers and co-makers signing the Note and all their successors and assigns.

Collateral. The word "Collateral" means all of Grantor's right, title and interest in and to all the Collateral as described in the Collateral Description section of this Agreement.

Default. The word "Default" means the Default set forth in this Agreement in the section titled "Default".

Environmental Laws. The words "Environmental Laws" mean any and all state, federal and local statutes, regulations and ordinances relating to the protection of human health or the environment, including without limitation the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. Section 9601, et seq. ("CERCLA"), the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 ("SARA"), the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801, et seq., the Resource Conservation and Recovery Act, 42 U.S.C. Section 6901, et seq., or other applicable state or federal laws, rules, or regulations adopted pursuant thereto.

Event of Default. The words "Event of Default" mean any of the events of default set forth in this Agreement in the default section of this Agreement.

Grantor. The word "Grantor" means Tri-Steel Construction Company, Inc..

Guarantor. The word "Guarantor" means any guarantor, surety, or accommodation party of any or all of the Indebtedness.

Guaranty. The word "Guaranty" means the guaranty from Guarantor to Lender, including without limitation a guaranty of all or part of the Note.

Hazardous Substances. The words "Hazardous Substances" mean materials that, because of their quantity, concentration or physical, chemical or infectious characteristics, may cause or pose a present or potential hazard to human health or the environment when improperly used, treated, stored, disposed of, generated, manufactured, transported or otherwise handled. The words "Hazardous Substances" are used in their very broadest sense and include without limitation any and all hazardous or toxic substances, materials or waste as defined by or listed under the Environmental Laws. The term "Hazardous Substances" also includes, without limitation, petroleum and petroleum by-products or any fraction thereof and asbestos.

Indebtedness. The word "Indebtedness" means the indebtedness evidenced by the Note or Related Documents, including all principal and interest together with all other indebtedness and costs and expenses for which Grantor is responsible under this Agreement or under any of the Related Documents. Specifically, without limitation, Indebtedness includes all amounts that may be indirectly secured by the Cross-Collateralization provision of this Agreement.

Lender. The word "Lender" means KeyBank National Association, its successors and assigns.

Note. The word "Note" means the Note executed by Tri-Steel Construction Company, Inc. in the principal amount of \$150,000.00 dated April 16, 2007, together with all renewals of, extensions of, modifications of, refinancings of, consolidations of, and substitutions for the note or credit agreement.

Property. The word "Property" means all of Grantor's right, title and interest in and to all the Property as described in the "Collateral Description" section of this Agreement.

Real Property. The words "Real Property" mean the real property, interests and rights, as further described in this Agreement.

Related Documents. The words "Related Documents" mean all promissory notes, credit agreements, loan agreements, environmental agreements, guaranties, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness.

GRANTOR HAS READ AND UNDERSTOOD ALL THE PROVISIONS OF THIS COMMERCIAL SECURITY AGREEMENT AND AGREES TO ITS TERMS. THIS AGREEMENT IS DATED APRIL 16, 2007.

GRANTOR:

TRI-STEEL CONSTRUCTION COMPANY, INC.

By: LuDean Palmer
LuDean Palmer, Secretary of Tri-Steel Construction Company, Inc.

By: Dean L. Palmer
Dean L. Palmer, President of Tri-Steel Construction Company, Inc.

UCC FINANCING STATEMENT

ELECTRONIC FILING*

A. NAME, PHONE, EMAIL, FAX OF CONTACT AT FILER:	
NATHAN ----	NATHAN J LEACH@KEYBANK.COM ----
B. SEND ACKNOWLEDGMENT TO: (Name and Address)	
KEYBANK NA	

IDAHO SECRETARY OF STATE

4/23/2007 13:53:13

\$3.00

Filing Number:

B 2007-1024332-4

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. DEBTOR'S EXACT FULL LEGAL NAME: - Insert only one debtor name (1a or 1b) - do not abbreviate or combine names				
1a. ORGANIZATION'S NAME:				
OR TRI-STEEL CONSTRUCTION COMPANY, INC.				
1b. LAST NAME:		FIRST NAME:	MIDDLE NAME:	SUFFIX:
1c. MAILING ADDRESS:		CITY:	STATE:	POSTAL CODE:
1305 S 12TH W		REXBURG	ID	83440
1. TAX ID #: SSN OR TIN	ADD. BEFORE ORGANIZATION SECTION	1e. TYPE OF ORG:	1f. JURISDICTION OF ORG:	1g. ORGANIZATIONAL ID #: (if any)
		CORPORATION	IDAHO	C120860
3. SECURED PARTY'S NAME: (or NAME of TOTAL ASSIGNEE of ASSIGNOR S/P) - Insert only one secured party name (3a or 3b)				
3a. ORGANIZATION'S NAME:				
OR KEYBANK NATIONAL ASSOCIATION				
3b. LAST NAME:		FIRST NAME:	MIDDLE NAME:	SUFFIX:
3c. MAILING ADDRESS:		CITY:	STATE:	POSTAL CODE:
110 E. MAIN STREET		REXBURG	ID	83440

4. This FINANCING STATEMENT covers the following collateral:

ALL INVENTORY, EQUIPMENT, ACCOUNTS (INCLUDING BUT NOT LIMITED TO ALL HEALTH-CARE-INSURANCE RECEIVABLES), CHATTEL PAPER, INSTRUMENTS (INCLUDING BUT NOT LIMITED TO ALL PROMISSORY NOTES), LETTER-OF-CREDIT RIGHTS, LETTERS OF CREDIT, DOCUMENTS, DEPOSIT ACCOUNTS, INVESTMENT PROPERTY, MONEY, OTHER RIGHTS TO PAYMENT AND PERFORMANCE, AND GENERAL INTANGIBLES (INCLUDING BUT NOT LIMITED TO ALL SOFTWARE AND ALL PAYMENT INTANGIBLES); ALL OIL, GAS AND OTHER MINERALS BEFORE EXTRACTION; ALL OIL, GAS, OTHER MINERALS AND ACCOUNTS CONSTITUTING AS-EXTRACTED COLLATERAL; ALL FIXTURES; ALL TIMBER TO BE CUT; ALL ATTACHMENTS, ACCESSIONS, ACCESSORIES, FITTINGS, INCREASES, TOOLS, PARTS, REPAIRS, SUPPLIES, AND COMMINGLED GOODS RELATING TO THE FOREGOING PROPERTY, AND ALL ADDITIONS, REPLACEMENTS OF AND SUBSTITUTIONS FOR ALL OR ANY PART OF THE FOREGOING PROPERTY; ALL INSURANCE REFUNDS RELATING TO THE FOREGOING PROPERTY; ALL GOOD WILL RELATING TO THE FOREGOING PROPERTY; ALL RECORDS AND DATA AND EMBEDDED SOFTWARE RELATING TO THE FOREGOING PROPERTY, AND ALL EQUIPMENT, INVENTORY AND SOFTWARE TO UTILIZE, CREATE, MAINTAIN AND PROCESS ANY SUCH RECORDS AND DATA ON ELECTRONIC MEDIA; AND ALL SUPPORTING OBLIGATIONS RELATING TO THE FOREGOING PROPERTY; ALL WHETHER NOW EXISTING OR HEREAFTER ARISING, WHETHER NOW OWNED OR HEREAFTER ACQUIRED OR WHETHER NOW OR HEREAFTER SUBJECT TO ANY RIGHTS IN THE FOREGOING PROPERTY; AND ALL PRODUCTS AND PROCEEDS (INCLUDING BUT NOT LIMITED TO ALL INSURANCE PAYMENTS) OF OR RELATING TO THE FOREGOING PROPERTY.

5. ALTERNATIVE DESIGNATION (if applicable):

☐ LESSEE/LESSOR ☐ CONSIGNEE/CONSIGNOR ☐ BAILEE/BAILOR ☐ SELLER/BUYER
6. ☐ This FINANCING STATEMENT is to be filed (for record) (or recorded) in the REAL ESTATE RECORDS. Attach Addendum (if applicable)

7. Check to REQUEST SEARCH REPORT(S) on Debtor(s)

ADDITIONAL FEE (optional) ☐ All Debtors ☐ Debtor 1 ☐ Debtor 2

8. OPTIONAL FILER REFERENCE DATA:

5602420491 - 18

*Electronically generated from original XML Document

GIVENS PURSLEY LLP

LAW OFFICES
601 W. Bannock Street
PO Box 2720, Boise, Idaho 83701
TELEPHONE: 208 388-1200
FACSIMILE: 208 388-1300
WEBSITE: www.givenspursley.com

Gary G. Allen	Steven J. Hippler	Deborah E. Nelson
Peter G. Barton	Donald E. Knickrehm	Kelsey J. Nunez
Christopher J. Beeson	Debra K. Kristensen	W. Hugh O'Riordan, LL.M.
Clint R. Bolinder	Anne C. Kunkel	Angela M. Reed
Erik J. Bolinder	Michael P. Lawrence	Justin A. Steiner
Jeremy C. Chou	Franklin G. Lee	Conley E. Ward
William C. Cole	David R. Lombardi	Robert B. White
Michael C. Creamer	Emily L. McClure	
Amber N. Dina	Kenneth R. McClure	
Elizabeth M. Donick	Kelly Greene McConnell	
Kristin Bjorkman Dunn	Cynthia A. Melillo	
Thomas E. Dvorak	Christopher H. Meyer	RETIRED
Jeffrey C. Fereday	L. Edward Miller	Kenneth L. Pursley
Justin M. Fredin	Patrick J. Miller	James A. McClure
Martin C. Hendrickson	Judson B. Montgomery	Raymond D. Givens (1917-2008)

June 8, 2010

Via Facsimile

B. J. Driscoll
Smith Driscoll & Associates, PLLC
414 Shoup Avenue
P.O. Box 50731
Idaho Falls, ID 83405-0731

Re: *PAL I, LLC v. Palmer*
Our File: 10894-2

Dear Mr. Driscoll:

As you know, this firm represents KeyBank in a lawsuit which has been filed against Dean Palmer and Tri-Steel Construction Company. We received the enclosed Default Judgment against Tri-Steel on June 1, 2010. This letter is in follow-up to the letter from Tom Dvorak dated May 6, 2010.

Pursuant to the enclosed Security Agreement and UCC filing, KeyBank has a perfected security interest in the personal property of Tri-Steel Construction Company that is scheduled for sale on June 9, 2010 at 10:00 a.m. Notably, KeyBank also has a perfected security interest in all proceeds from the sale of the property. See Security Agreement, p. 1, Collateral Description (D) ("All proceeds . . . from the sale, destruction, loss or other disposition of any of the property described in this Collateral section . . .").

Therefore, KeyBank requests that you postpone the sale until we can obtain a court order regarding the priority of our interests in the property. If you choose to proceed with the sale, please instruct the Sheriff's office to hold all the sale proceeds in a trust account, so we can then litigate over their distribution. If you proceed with the sale and fail to retain the proceeds in a trust account, KeyBank will hold PAL I fully responsible for its lost collateral and proceeds.

B. J. Driscoll
June 8, 2010
Page 2

Sincerely,

A handwritten signature in cursive script, appearing to read "Amber N. Dina".

Amber N. Dina

Enclosures

cc: Thomas Dvorak (via email)
Bill Cole (via email)
Judy Johns (via e-mail)

890263-1

RECEIVED

Thomas E. Dvorak (Idaho State Bar ID# 5043)

JUN 09 2010

William C. Cole (Idaho State Bar ID# 4883)

GIVENS PURSLEY LLP

Givens Pursley, LLP

601 West Bannock Street

Post Office Box 2720

Boise, Idaho 83701-2720

Telephone: 208-388-1200

Facsimile: 208-388-1300

846702_1 (10894-2)

Attorneys for KeyBank National Association

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT FOR THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION, a
national banking association,

Plaintiffs,

v.

TRI-STEEL CONSTRUCTION COMPANY,
INC., an Idaho corporation; DEAN L. PALMER
and LUDEAN PALMER, husband and wife;
DUSTIN PALMER and CANDICE PALMER,
husband and wife; STEELLINE LLC, an Idaho
limited liability company,

Defendants.

Case No. CV-10-191

DEFAULT JUDGMENT

WHEREAS, Defendants Tri-Steel Construction Company, Inc., and Steelline LLC have
been regularly served with the Complaint in this matter;

WHEREAS Defendants have failed to plead or otherwise defend as required by the Idaho
Rules of Civil Procedure;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

EXECUTED JUDGMENT - 1

1. The Default of Defendants Tri-Steel Construction Company, Inc., and Steelline LLC (collectively the "Defaulting Defendants") shall be entered by the Clerk of the Court in accordance with the law;

2. Judgment is hereby entered in favor of Plaintiff KeyBank National Association against Defendants Tri-Steel Construction Company, Inc. and Steelline LLC on all counts in Plaintiff's Complaint.

3. The Defaulting Defendants are jointly and severally liable to Plaintiff in the amount of \$296,500.74 as of April 20, 2010, plus interest on said amount at the per diem rate of \$51.73 per day until the date of entry of this judgment and then from and after the date of judgment at the judgment rate of 5.625%.

4. An additional amount is awarded jointly and severally as against these Defaulting Defendants for costs and attorneys' fees in the amount \$9,349.05, plus interest thereafter at the judgment rate as specified above from and after the date of judgment.

5. Pursuant to Idaho Code Section 8-301, *et. seq.*, KeyBank is entitled to a Writ of Possession as against Tri-Steel Construction Company, Inc. directing the Sheriff

- a. to put KeyBank in possession of the 2007 Collateral and the 2008 Collateral as defined in the Complaint on file in this matter;
- b. Authorizing the Sheriff to take possession of said Collateral wherever it may be found and to make such entry upon real property as may be necessary to secure the possession of said Collateral;
- c. Commanding the Sheriff to keep the aforesaid Collateral in a secure place and deliver it to KeyBank upon the payment of reasonably incurred fees and expenses incurred in seizing the property; and

d. Authorizing KeyBank, upon its receipt of possession of said collateral, to utilize its non-judicial remedies under the Uniform Commercial Code with respect to such property.

DATED this 27 day of May, 2010.

51 Gregory W. Moeller
The Honorable Gregory W. Moeller
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 1 day of June, 2010, I caused to be served a true and correct copy of the foregoing document to the persons listed below the method indicated:

Thomas E. Dvorak
Givens Pursley LLP
P.O. Box 2720
Boise, ID 83701

☐ Hand Delivery
☐ Facsimile
☐ Overnight Courier
☒ U.S. Mail

Dustin and Candice Palmer
591 Twisted Willow Road
Rexburg, ID 83440

☐ Hand Delivery
☐ Facsimile
☐ Overnight Courier
☒ U.S. Mail

Tri-Steel Construction Company, Inc.
1305 S 12th W
Rexburg, ID 83440

☐ Hand Delivery
☐ Facsimile
☐ Overnight Courier
☒ U.S. Mail

Dean L. Palmer and LuDean Palmer
1305 S 12th W
Rexburg, ID 83440

☐ Hand Delivery
☐ Facsimile
☐ Overnight Courier
☒ U.S. Mail

Steelline LLC
1305 S 12th W
Rexburg, ID 83440

☐ Hand Delivery
☐ Facsimile
☐ Overnight Courier
☒ U.S. Mail





56560242049123825550070E40

COMMERCIAL SECURITY AGREEMENT

Principal	Loan Date	Maturity	Loan No	Coll Coll	Account	Officer	Initials
\$150,000.00	04-16-2007	04-16-2014	2382555007	402/326	N5602420491	JRH28	

References in the shaded area are for Lender's use only and do not limit the applicability of this document to any particular loan or item. Any item above containing "****" has been omitted due to text length limitations.

Grantor: Tri-Steel Construction Company, Inc.
1308 S 12th W
Rexburg, ID 83440

Lender: KeyBank National Association
ID-88-Rexburg
110 E. Main Street
Rexburg, ID 83440

THIS COMMERCIAL SECURITY AGREEMENT dated April 16, 2007, is made and executed between Tri-Steel Construction Company, Inc. ("Grantor") and KeyBank National Association ("Lender").

GRANT OF SECURITY INTEREST. For valuable consideration, Grantor grants to Lender a security interest in the Collateral to secure the indebtedness and agrees that Lender shall have the rights stated in this Agreement with respect to the Collateral, in addition to all other rights which Lender may have by law.

COLLATERAL DESCRIPTION The word "Collateral" as used in this Agreement means the following described property, whether now owned or hereafter acquired, whether now existing or hereafter arising, and wherever located, in which Grantor is giving to Lender a security interest for the payment of the indebtedness and performance of all other obligations under the Note and this Agreement:

All inventory, equipment, accounts (including but not limited to all health-care-insurance receivables), chattel paper, instruments (including but not limited to all promissory notes), letter-of-credit rights, letters of credit, documents, deposit accounts, investment property, money, other rights to payment and performance, and general intangibles (including but not limited to all software and all payment intangibles); all oil, gas and other minerals before extraction; all oil, gas, other minerals and accounts constituting as-extracted collateral; all fixtures; all timber to be cut; all attachments, accessions, accessories, fittings, increases, tools, parts, repairs, supplies, and commingled goods relating to the foregoing property, and all additions, replacements of and substitutions for all or any part of the foregoing property; all insurance refunds relating to the foregoing property; all good will relating to the foregoing property; all records and data and embedded software relating to the foregoing property, and all equipment, inventory and software to utilize, create, maintain and process any such records and data on electronic media; and all supporting obligations relating to the foregoing property; all whether now existing or hereafter arising, whether now owned or hereafter acquired or whether now or hereafter subject to any rights in the foregoing property; and all products and proceeds (including but not limited to all insurance payments) of or relating to the foregoing property.

In addition, the word "Collateral" also includes all the following, whether now owned or hereafter acquired, whether now existing or hereafter arising, and wherever located

- (A) All accessions, attachments, accessories, tools, parts, supplies, replacements of and additions to any of the collateral described herein, whether added now or later
- (B) All products and produce of any of the property described in this Collateral section.
- (C) All accounts, general intangibles, instruments, rents, monies, payments, and all other rights, arising out of a sale, lease, consignment or other disposition of any of the property described in this Collateral section
- (D) All proceeds (including insurance proceeds) from the sale, destruction, loss, or other disposition of any of the property described in this Collateral section, and sums due from a third party who has damaged or destroyed the Collateral or from that party's insurer, whether due to judgment, settlement or other process.
- (E) All records and data relating to any of the property described in this Collateral section, whether in the form of a writing, photograph, microfilm, microfiche, or electronic media, together with all of Grantor's right, title, and interest in and to all computer software required to utilize, create, maintain, and process any such records or data on electronic media

CROSS-COLLATERALIZATION. In addition to the Note, this Agreement secures all obligations, debts and liabilities, plus interest thereon, of Grantor to Lender, or any one or more of them, as well as all claims by Lender against Grantor or any one or more of them, whether now existing or hereafter arising, whether related or unrelated to the purpose of the Note, whether voluntary or otherwise, whether due or not due, direct or indirect, determined or undetermined, absolute or contingent, liquidated or unliquidated, whether Grantor may be liable individually or jointly with others, whether obligated as guarantor, surety, accommodation party or otherwise, and whether recovery upon such amounts may be or hereafter may become barred by any statute of limitations, and whether the obligation to repay such amounts may be or hereafter may become otherwise unenforceable.

RIGHT OF SETOFF. To the extent permitted by applicable law, Lender reserves a right of setoff in all Grantor's accounts with Lender (whether checking, savings, or some other account). This includes all accounts Grantor holds jointly with someone else and all accounts Grantor may open in the future. However, this does not include any IRA or Keogh accounts, or any trust accounts for which setoff would be prohibited by law. Grantor authorizes Lender, to the extent permitted by applicable law, to charge or setoff all sums owing on the indebtedness against any and all such accounts

GRANTOR'S REPRESENTATIONS AND WARRANTIES WITH RESPECT TO THE COLLATERAL. With respect to the Collateral, Grantor represents and promises to Lender that

Perfection of Security Interest. Grantor agrees to take whatever actions are requested by Lender to perfect and continue Lender's security interest in the Collateral. Upon request of Lender, Grantor will deliver to Lender any and all of the documents evidencing or constituting the Collateral, and Grantor will note Lender's interest upon any and all chattel paper and instruments if not delivered to Lender for possession by Lender. This is a continuing Security Agreement and will continue in effect even though all or any part of the indebtedness is paid in full and even though for a period of time Grantor may not be indebted to Lender.

Notice to Lender. Grantor will promptly notify Lender in writing at Lender's address shown above (or such other addresses as Lender may name), (2) change in Grantor's assumed business name(s); (3) change

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in the management of the Corporation Grantor, (4) change in the authorized signer(s), (5) change in Grantor's principal office address; (6) change in Grantor's state of organization, (7) conversion of Grantor to a new or different type of business entity; or (8) change in any other aspect of Grantor that directly or indirectly relates to any agreements between Grantor and Lender. No change in Grantor's name or state of organization will take effect until after Lender has received notice.

No Violation. The execution and delivery of this Agreement will not violate any law or agreement governing Grantor or to which Grantor is a party, and its certificate or articles of incorporation and bylaws do not prohibit any term or condition of this Agreement.

Enforceability of Collateral. To the extent the Collateral consists of accounts, chattel paper, or general intangibles, as defined by the Uniform Commercial Code, the Collateral is enforceable in accordance with its terms, is genuine, and fully complies with all applicable laws and regulations concerning form, content and manner of preparation and execution, and all persons appearing to be obligated on the Collateral have authority and capacity to contract and are in fact obligated as they appear to be on the Collateral. At the time any account becomes subject to a security interest in favor of Lender, the account shall be a good and valid account representing an undisputed, bona fide indebtedness incurred by the account debtor, for merchandise held subject to delivery instructions or previously shipped or delivered pursuant to a contract of sale, or for services previously performed by Grantor with or for the account debtor. So long as this Agreement remains in effect, Grantor shall not, without Lender's prior written consent, compromise, settle, adjust, or extend payment under or with regard to any such Accounts. There shall be no setoffs or counterclaims against any of the Collateral, and no agreement shall have been made under which any deductions or discounts may be claimed concerning the Collateral except those disclosed to Lender in writing.

Location of the Collateral. Except in the ordinary course of Grantor's business, Grantor agrees to keep the Collateral (or to the extent the Collateral consists of intangible property such as accounts or general intangibles, the records concerning the Collateral) at Grantor's address shown above or at such other locations as are acceptable to Lender. Upon Lender's request, Grantor will deliver to Lender in form satisfactory to Lender a schedule of real properties and Collateral locations relating to Grantor's operations, including without limitation the following: (1) all real property Grantor owns or is purchasing, (2) all real property Grantor is renting or leasing, (3) all storage facilities Grantor owns, rents, leases, or uses, and (4) all other properties where Collateral is or may be located.

Removal of the Collateral. Except in the ordinary course of Grantor's business, including the sales of inventory, Grantor shall not remove the Collateral from its existing location without Lender's prior written consent. To the extent that the Collateral consists of vehicles, or other titled property, Grantor shall not take or permit any action which would require application for certificates of title for the vehicles outside the State of Idaho, without Lender's prior written consent. Grantor shall, whenever requested, advise Lender of the exact location of the Collateral.

Transactions Involving Collateral. Except for inventory sold or accounts collected in the ordinary course of Grantor's business, or as otherwise provided for in this Agreement, Grantor shall not sell, offer to sell, or otherwise transfer or dispose of the Collateral. While Grantor is not in default under this Agreement, Grantor may sell inventory, but only in the ordinary course of its business and only to buyers who qualify as a buyer in the ordinary course of business. A sale in the ordinary course of Grantor's business does not include a transfer in partial or total satisfaction of a debt or any bulk sale. Grantor shall not pledge, mortgage, encumber or otherwise permit the Collateral to be subject to any lien, security interest, encumbrance, or charge, other than the security interest provided for in this Agreement, without the prior written consent of Lender. This includes security interests even if junior in right to the security interests granted under this Agreement. Unless waived by Lender, all proceeds from any disposition of the Collateral (for whatever reason) shall be held in trust for Lender and shall not be commingled with any other funds; provided however, this requirement shall not constitute consent by Lender to any sale or other disposition. Upon receipt, Grantor shall immediately deliver any such proceeds to Lender.

Title. Grantor represents and warrants to Lender that Grantor holds good and marketable title to the Collateral, free and clear of all liens and encumbrances except for the lien of this Agreement. No financing statement covering any of the Collateral is on file in any public office other than those which reflect the security interest created by this Agreement or to which Lender has specifically consented. Grantor shall defend Lender's rights in the Collateral against the claims and demands of all other persons.

Repairs and Maintenance. Grantor agrees to keep and maintain, and to cause others to keep and maintain, the Collateral in good order, repair and condition at all times while this Agreement remains in effect. Grantor further agrees to pay when due all claims for work done on, or services rendered or material furnished in connection with the Collateral so that no lien or encumbrance may ever attach to or be filed against the Collateral.

Inspection of Collateral. Lender and Lender's designated representatives and agents shall have the right at all reasonable times to examine and inspect the Collateral wherever located.

Taxes, Assessments and Liens. Grantor will pay when due all taxes, assessments and liens upon the Collateral, its use or operation, upon this Agreement, upon any promissory note or notes evidencing the indebtedness, or upon any of the other Related Documents. Grantor may withhold any such payment or may elect to contest any lien if Grantor is in good faith conducting an appropriate proceeding to contest the obligation to pay and so long as Lender's interest in the Collateral is not jeopardized in Lender's sole opinion. If the Collateral is subjected to a lien which is not discharged within fifteen (15) days, Grantor shall deposit with Lender cash, a sufficient corporate surety bond or other security satisfactory to Lender in an amount adequate to provide for the discharge of the lien plus any interest, costs, reasonable attorneys' fees or other charges that could accrue as a result of foreclosure or sale of the Collateral. In any contest Grantor shall defend itself and Lender and shall satisfy any final adverse judgment before enforcement against the Collateral. Grantor shall name Lender as an additional obligee under any surety bond furnished in the contest proceedings. Grantor further agrees to furnish Lender with evidence that such taxes, assessments, and governmental and other charges have been paid in full and in a timely manner. Grantor may withhold any such payment or may elect to contest any lien if Grantor is in good faith conducting an appropriate proceeding to contest the obligation to pay and so long as Lender's interest in the Collateral is not jeopardized.

Compliance with Governmental Requirements. Grantor shall comply promptly with all laws, ordinances, rules and regulations of all governmental authorities, now or hereafter in effect, applicable to the ownership, production, disposition, or use of the Collateral, including all laws or regulations relating to the undue erosion of highly-erodible land or relating to the conversion of wetlands for the production of an agricultural product or commodity. Grantor may contest in good faith any such law, ordinance or regulation and withhold compliance during any proceeding, including appropriate appeals, so long as Lender's interest in the Collateral, in Lender's opinion, is not jeopardized.

Hazardous Substances. Grantor represents and warrants that the Collateral never has been, and never will be so long as this Agreement remains a lien on the Collateral, used in violation of any Environmental Laws or for the generation, manufacture, storage, transportation, treatment, disposal, release or threatened release of any Hazardous Substance. The representations and warranties contained herein are based on Grantor's due diligence in investigating the Collateral for Hazardous Substances. Grantor hereby (1) releases and waives any future claims against Lender for indemnity or contribution in the event Grantor becomes liable for cleanup or other costs under any Environmental Laws, and (2) agrees to indemnify, defend, and hold harmless Lender against any and all claims and losses resulting from a breach of this provision of this Agreement. This obligation to indemnify and defend shall survive the payment of the indebtedness and the

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Maintenance of Casualty Insurance. Grantor shall procure and maintain all risks insurance, including without limitation fire, theft and liability coverage together with such other insurance as Lender may require with respect to the Collateral, in form, amounts, coverages and basis reasonably acceptable to Lender and issued by a company or companies reasonably acceptable to Lender. Grantor, upon request of Lender, will deliver to Lender from time to time the policies or certificates of insurance in form satisfactory to Lender, including stipulations that coverages will not be cancelled or diminished without at least ten (10) days' prior written notice to Lender and not including any disclaimer of the insurer's liability for failure to give such a notice. Each insurance policy also shall include an endorsement providing that coverage in favor of Lender will not be impaired in any way by any act, omission or default of Grantor or any other persons. In connection with all policies covering assets in which Lender holds or is offered a security interest, Grantor will provide Lender with such loss payable or other endorsements as Lender may require. If Grantor at any time fails to obtain or maintain any insurance as required under this Agreement, Lender may (but shall not be obligated to) obtain such insurance as Lender deems appropriate, including if Lender so chooses "single interest insurance," which will cover only Lender's interest in the Collateral.

Application of Insurance Proceeds. Grantor shall promptly notify Lender of any loss or damage to the Collateral if the estimated cost of repair or replacement exceeds \$500.00, whether or not such casualty or loss is covered by insurance. Lender may make proof of loss if Grantor fails to do so within fifteen (15) days of the casualty. All proceeds of any insurance on the Collateral, including accrued proceeds thereon, shall be held by Lender as part of the Collateral. If Lender consents to repair or replacement of the damaged or destroyed Collateral, Lender shall, upon satisfactory proof of expenditure, pay or reimburse Grantor from the proceeds for the reasonable cost of repair or restoration. If Lender does not consent to repair or replacement of the Collateral, Lender shall retain a sufficient amount of the proceeds to pay all of the indebtedness, and shall pay the balance to Grantor. Any proceeds which have not been disbursed within six (6) months after their receipt and which Grantor has not committed to the repair or restoration of the Collateral shall be used to prepay the indebtedness.

Insurance Reserves. Lender may require Grantor to maintain with Lender reserves for payment of insurance premiums, which reserves shall be created by monthly payments from Grantor of a sum estimated by Lender to be sufficient to produce, at least fifteen (15) days before the premium due date, amounts at least equal to the insurance premiums to be paid. If fifteen (15) days before payment is due, the reserve funds are insufficient, Grantor shall upon demand pay any deficiency to Lender. The reserve funds shall be held by Lender as a general deposit and shall constitute a non-interest-bearing account which Lender may satisfy by payment of the insurance premiums required to be paid by Grantor as they become due. Lender does not hold the reserve funds in trust for Grantor, and Lender is not the agent of Grantor for payment of the insurance premiums required to be paid by Grantor. The responsibility for the payment of premiums shall remain Grantor's sole responsibility.

Insurance Reports. Grantor, upon request of Lender, shall furnish to Lender reports on each existing policy of insurance showing such information as Lender may reasonably request including the following: (1) the name of the insurer; (2) the risks insured; (3) the amount of the policy; (4) the property insured; (5) the then current value on the basis of which insurance has been obtained and the manner of determining that value; and (6) the expiration date of the policy. In addition, Grantor shall upon request by Lender (however not more often than annually) have an independent appraiser satisfactory to Lender determine, as applicable, the cash value or replacement cost of the Collateral.

Financing Statements. Grantor authorizes Lender to file a UCC financing statement, or alternatively, a copy of this Agreement to perfect Lender's security interest. At Lender's request, Grantor additionally agrees to sign all other documents that are necessary to perfect, protect, and continue Lender's security interest in the Property. Grantor will pay all filing fees, title transfer fees, and other fees and costs involved unless prohibited by law or unless Lender is required by law to pay such fees and costs. Grantor irrevocably appoints Lender to execute documents necessary to transfer title if there is a default. Lender may file a copy of this Agreement as a financing statement. If Grantor changes Grantor's name or address, or the name or address of any person granting a security interest under this Agreement changes, Grantor will promptly notify the Lender of such change.

GRANTOR'S RIGHT TO POSSESSION AND TO COLLECT ACCOUNTS. Until default and except as otherwise provided below with respect to accounts, Grantor may have possession of the tangible personal property and beneficial use of all the Collateral and may use it in any lawful manner not inconsistent with this Agreement or the Related Documents, provided that Grantor's right to possession and beneficial use shall not apply to any Collateral where possession of the Collateral by Lender is required by law to perfect Lender's security interest in such Collateral. Until otherwise notified by Lender, Grantor may collect any of the Collateral consisting of accounts. At any time and even though no Event of Default exists, Lender may exercise its rights to collect the accounts and to notify account debtors to make payments directly to Lender for application to the indebtedness. If Lender at any time has possession of any Collateral, whether before or after an Event of Default, Lender shall be deemed to have exercised reasonable care in the custody and preservation of the Collateral if Lender takes such action for that purpose as Grantor shall request or as Lender, in Lender's sole discretion, shall deem appropriate under the circumstances, but failure to honor any request by Grantor shall not of itself be deemed to be a failure to exercise reasonable care. Lender shall not be required to take any steps necessary to preserve any rights in the Collateral against prior parties, nor to protect, preserve or maintain any security interest given to secure the indebtedness.

LENDER'S EXPENDITURES. If any action or proceeding is commenced that would materially affect Lender's interest in the Collateral or if Grantor fails to comply with any provision of this Agreement or any Related Documents, including but not limited to Grantor's failure to discharge or pay when due any amounts Grantor is required to discharge or pay under this Agreement or any Related Documents, Lender on Grantor's behalf may (but shall not be obligated to) take any action that Lender deems appropriate, including but not limited to discharging or paying all taxes, liens, security interests, encumbrances and other claims, at any time levied or placed on the Collateral and paying all costs for insuring, maintaining and preserving the Collateral. All such expenditures incurred or paid by Lender for such purposes will then bear interest at the rate charged under the Note from the date incurred or paid by Lender to the date of repayment by Grantor. All such expenses will become a part of the indebtedness and, at Lender's option, will (A) be payable on demand; (B) be added to the balance of the Note and be apportioned among and be payable with any installment payments to become due during either (1) the term of any applicable insurance policy, or (2) the remaining term of the Note; or (C) be treated as a balloon payment which will be due and payable at the Note's maturity. The Agreement also will secure payment of these amounts. Such right shall be in addition to all other rights and remedies to which Lender may be entitled upon Default.

DEFAULT. Each of the following shall constitute an Event of Default under this Agreement:

Payment Default. Grantor fails to make any payment when due under the indebtedness.

Other Defaults. Grantor fails to comply with or to perform any other term, obligation, covenant or condition contained in this Agreement or in any of the Related Documents or to comply with or to perform any term, obligation, covenant or condition contained in any other agreement between Lender and Grantor.

Default in Favor of Third Parties. Should Borrower or any Grantor default under any loan, extension of credit, security agreement, purchase or sales agreement, or any other agreement, in favor of any other creditor or person that may materially affect any of Grantor's property or Grantor's or any Grantor's ability to repay the indebtedness or perform their respective obligations under this Agreement or any of the

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Related Documents

False Statements. Any warranty, representation or statement made or furnished to Lender by Grantor or on Grantor's behalf under this Agreement or the Related Documents is false or misleading in any material respect, either now or at the time made or furnished or becomes false or misleading at any time thereafter.

Defective Collateralization. This Agreement or any of the Related Documents ceases to be in full force and effect (including failure of any collateral document to create a valid and perfected security interest or lien) at any time and for any reason.

Insolvency. The dissolution or termination of Grantor's existence as a going business, the insolvency of Grantor, the appointment of a receiver for any part of Grantor's property, any assignment for the benefit of creditors, any type of creditor workout, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Grantor.

Creditor or Forfeiture Proceedings. Commencement of foreclosure or forfeiture proceedings, whether by judicial proceeding, self-help, repossession or any other method, by any creditor of Grantor or by any governmental agency against any collateral securing the Indebtedness. This includes a garnishment of any of Grantor's accounts, including deposit accounts, with Lender. However, this Event of Default shall not apply if there is a good faith dispute by Grantor as to the validity or reasonableness of the claim which is the basis of the creditor or forfeiture proceeding and if Grantor gives Lender written notice of the creditor or forfeiture proceeding and deposits with Lender monies or a surety bond for the creditor or forfeiture proceeding, in an amount determined by Lender, in its sole discretion, as being an adequate reserve or bond for the dispute.

Events Affecting Guarantor. Any of the preceding events occurs with respect to any Guarantor of any of the Indebtedness or Guarantor dies or becomes incompetent or revokes or disputes the validity of, or liability under, any Guaranty of the Indebtedness.

Adverse Change. A material adverse change occurs in Grantor's financial condition, or Lender believes the prospect of payment or performance of the Indebtedness is impaired.

Insecurity. Lender in good faith believes itself insecure

Cure Provisions. If any default, other than a default in payment is curable and if Grantor has not been given a notice of a breach of the same provision of this Agreement within the preceding twelve (12) months, it may be cured if Grantor, after receiving written notice from Lender demanding cure of such default, (1) cures the default within fifteen (15) days; or (2) if the cure requires more than fifteen (15) days, immediately initiates steps which Lender deems in Lender's sole discretion to be sufficient to cure the default and thereafter continues and completes all reasonable and necessary steps sufficient to produce compliance as soon as reasonably practical.

RIGHTS AND REMEDIES ON DEFAULT. If an Event of Default occurs under this Agreement, at any time thereafter, Lender shall have all the rights of a secured party under the Idaho Uniform Commercial Code. In addition and without limitation, Lender may exercise any one or more of the following rights and remedies:

Notice of Default. In the Event of Default Lender shall execute or cause the Trustee to execute a written notice of such default and of Lender's election to cause the Property to be sold to satisfy the Indebtedness, and shall cause such notice to be recorded in the office of the recorder of each county wherein the Real Property, or any part thereof, is situated.

Accelerate Indebtedness. Lender may declare the entire Indebtedness, including any prepayment penalty which Grantor would be required to pay, immediately due and payable, without notice of any kind to Grantor.

Assemble Collateral. Lender may require Grantor to deliver to Lender all or any portion of the Collateral and any and all certificates of title and other documents relating to the Collateral. Lender may require Grantor to assemble the Collateral and make it available to Lender at a place to be designated by Lender. Lender also shall have full power to enter upon the property of Grantor to take possession of and remove the Collateral. If the Collateral contains other goods not covered by this Agreement at the time of repossession, Grantor agrees Lender may take such other goods, provided that Lender makes reasonable efforts to return them to Grantor after repossession.

Sell the Collateral. Lender shall have full power to sell, lease, transfer, or otherwise deal with the Collateral or proceeds thereof in Lender's own name or that of Grantor. Lender may sell the Collateral at public auction or private sale. Unless the Collateral threatens to decline speedily in value or is of a type customarily sold on a recognized market, Lender will give Grantor, and other persons as required by law, reasonable notice of the time and place of any public sale, or the time after which any private sale or any other disposition of the Collateral is to be made. However, no notice need be provided to any person who, after Event of Default occurs, enters into and authenticates an agreement waiving that person's right to notification of sale. The requirements of reasonable notice shall be met if such notice is given at least ten (10) days before the time of the sale or disposition. All expenses relating to the disposition of the Collateral, including without limitation the expenses of retaking, holding, insuring, preparing for sale and selling the Collateral, shall become a part of the Indebtedness secured by this Agreement and shall be payable on demand, with interest at the Note rate from date of expenditure until repaid.

Appoint Receiver. Lender shall have the right to have a receiver appointed to take possession of all or any part of the Collateral, with the power to protect and preserve the Collateral, to operate the Collateral preceding foreclosure or sale, and to collect the Rents from the Collateral and apply the proceeds, over and above the cost of the receivership, against the Indebtedness. The receiver may serve without bond if permitted by law. Lender's right to the appointment of a receiver shall exist whether or not the apparent value of the Collateral exceeds the Indebtedness by a substantial amount. Employment by Lender shall not disqualify a person from serving as a receiver.

Collect Revenues, Apply Accounts. Lender, either itself or through a receiver, may collect the payments, rents, income, and revenues from the Collateral. Lender may at any time in Lender's discretion transfer any Collateral into Lender's own name or that of Lender's nominee and receive the payments, rents, income, and revenues therefrom and hold the same as security for the Indebtedness or apply it to payment of the Indebtedness in such order of preference as Lender may determine. Insofar as the Collateral consists of accounts, general intangibles, insurance policies, instruments, chattel paper, choses in action, or similar property, Lender may demand, collect, receipt for, settle, compromise, adjust, sue for, foreclose, or realize on the Collateral as Lender may determine, whether or not Indebtedness or Collateral is then due. For these purposes, Lender may, on behalf of and in the name of Grantor, receive, open and dispose of mail addressed to Grantor, change any address to which mail and payments are to be sent; and endorse notes, checks, drafts, money orders, documents of title, instruments and items pertaining to payment, shipment, or storage of any Collateral. To facilitate collection, Lender may notify account debtors and obligors on any Collateral to make payments directly to Lender.

Obtain Deficiency. If Lender chooses to sell any or all of the Collateral, Lender may obtain a judgment against Grantor for any deficiency remaining on the Indebtedness due to Lender after application of all amounts received from the exercise of the rights provided in this Agreement. Grantor shall be liable for a deficiency even if the transaction described in this subsection is a sale of accounts or chattel paper.

Other Rights and Remedies. Lender shall have all the rights and remedies of a secured creditor under the provisions of the Uniform Commercial Code. In addition, Lender shall have and may exercise any or all other rights and

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Election of Remedies. Except as may be prohibited by applicable law, all of Lender's rights and remedies, whether evidenced by this Agreement, the Related Documents, or by any other writing, shall be cumulative and may be exercised singularly or concurrently. Election by Lender to pursue any remedy shall not exclude pursuit of any other remedy, and an election to make expenditures or to take action to perform an obligation of Grantor under this Agreement, after Grantor's failure to perform, shall not affect Lender's right to declare a default and exercise its remedies.

SMALL BUSINESS ADMINISTRATION SPECIAL PROVISIONS. "The Loan secured by this lien was made under a United States Small Business Administration (SBA) nationwide program which uses tax dollars to assist small business owners. If the United States is seeking to enforce this document, then under SBA regulations: a) When SBA is the holder of the Note, this document and all documents evidencing or securing this Loan will be construed in accordance with federal law. b) Lender or SBA may use local or state procedures for purposes such as filing papers, recording documents, giving notice, foreclosing liens, and other purposes. By using these procedures, SBA does not waive any federal immunity from local or state control, penalty, tax or liability. No Borrower or Guarantor may claim or assert against SBA any local or state law to deny any obligation of Borrower, or defeat any claim of SBA with respect to this Loan. Any clause in this document requiring arbitration is not enforceable when SBA is the holder of the Note secured by this instrument."

MISCELLANEOUS PROVISIONS. The following miscellaneous provisions are a part of this Agreement:

Amendments. This Agreement, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Agreement. No alteration of or amendment to this Agreement shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.

Attorneys' Fees; Expenses. Grantor agrees to pay upon demand all of Lender's costs and expenses, including Lender's reasonable attorneys' fees and Lender's legal expenses, incurred in connection with the enforcement of this Agreement. Lender may hire or pay someone else to help enforce this Agreement, and Grantor shall pay the costs and expenses of such enforcement. Costs and expenses include Lender's reasonable attorneys' fees and legal expenses whether or not there is a lawsuit, including reasonable attorneys' fees and legal expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), appeals, and any anticipated post-judgment collection services. Grantor also shall pay all court costs and such additional fees as may be directed by the court.

Caption Headings. Caption headings in this Agreement are for convenience purposes only and are not to be used to interpret or define the provisions of this Agreement.

Governing Law. This Agreement will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of Idaho without regard to its conflicts of law provisions. This Agreement has been accepted by Lender in the State of Idaho.

No Waiver by Lender. Lender shall not be deemed to have waived any rights under this Agreement unless such waiver is given in writing and signed by Lender. No delay or omission on the part of Lender in exercising any right shall operate as a waiver of such right or any other right. A waiver by Lender of a provision of this Agreement shall not prejudice or constitute a waiver of Lender's right otherwise to demand strict compliance with that provision or any other provision of this Agreement. No prior waiver by Lender, nor any course of dealing between Lender and Grantor, shall constitute a waiver of any of Lender's rights or of any of Grantor's obligations as to any future transactions. Whenever the consent of Lender is required under this Agreement, the granting of such consent by Lender in any instance shall not constitute continuing consent to subsequent instances where such consent is required and in all cases such consent may be granted or withheld in the sole discretion of Lender.

Notices. Any notice required to be given under this Agreement shall be given in writing, and shall be effective when actually delivered, when actually received by telefacsimile (unless otherwise required by law), when deposited with a nationally recognized overnight courier, or, if mailed, when deposited in the United States mail, as first class, certified or registered mail postage prepaid, directed to the addresses shown near the beginning of this Agreement. Any party may change its address for notices under this Agreement by giving formal written notice to the other parties, specifying that the purpose of the notice is to change the party's address. For notice purposes, Grantor agrees to keep Lender informed at all times of Grantor's current address. Unless otherwise provided or required by law, if there is more than one Grantor, any notice given by Lender to any Grantor is deemed to be notice given to all Grantors.

Power of Attorney. Grantor hereby appoints Lender as Grantor's irrevocable attorney-in-fact for the purpose of executing any documents necessary to perfect, amend, or to continue the security interest granted in this Agreement or to demand termination of filings of other secured parties. Lender may at any time, and without further authorization from Grantor, file a carbon, photographic or other reproduction of any financing statement or of this Agreement for use as a financing statement. Grantor will reimburse Lender for all expenses for the perfection and the continuation of the perfection of Lender's security interest in the Collateral.

Severability. If a court of competent jurisdiction finds any provision of this Agreement to be illegal, invalid, or unenforceable as to any circumstance, that finding shall not make the offending provision illegal, invalid, or unenforceable as to any other circumstance. If feasible, the offending provision shall be considered modified so that it becomes legal, valid and enforceable. If the offending provision cannot be so modified, it shall be considered deleted from this Agreement. Unless otherwise required by law, the illegality, invalidity, or unenforceability of any provision of this Agreement shall not affect the legality, validity or enforceability of any other provision of this Agreement.

Successors and Assigns. Subject to any limitations stated in this Agreement on transfer of Grantor's interest, this Agreement shall be binding upon and inure to the benefit of the parties, their successors and assigns. If ownership of the Collateral becomes vested in a person other than Grantor, Lender, without notice to Grantor, may deal with Grantor's successors with reference to this Agreement and the indebtedness by way of forbearance or extension without releasing Grantor from the obligations of this Agreement or liability under the indebtedness.

Survival of Representations and Warranties. All representations, warranties, and agreements made by Grantor in this Agreement shall survive the execution and delivery of this Agreement, shall be continuing in nature, and shall remain in full force and effect until such time as Grantor's indebtedness shall be paid in full.

Time is of the Essence. Time is of the essence in the performance of this Agreement.

Waive Jury. All parties to this Agreement hereby waive the right to any jury trial in any action, proceeding, or counterclaim brought by any party against any other party.

DEFINITIONS. The following capitalized words and terms shall have the following meanings when used in this Agreement. Unless specifically stated to the contrary, all references to dollar amounts shall mean amounts in lawful money of the United States of America. Words and terms used in the singular shall include the plural, and the plural shall include the singular, as the context may require. Words and terms not otherwise defined in this Agreement shall have the meanings attributed to such terms in the Uniform Commercial Code.

Agreement, as this Commercial Security Agreement may be amended

COMMERCIAL SECURITY AGREEMENT
(Continued)

Loan No: 2382555007

Page 6

or modified from time to time, together with all exhibits and schedules attached to this Commercial Security Agreement from time to time.

Borrower. The word "Borrower" means Tri-Steel Construction Company, Inc. and includes all co-signers and co-makers signing the Note and all their successors and assigns.

Collateral. The word "Collateral" means all of Grantor's right, title and interest in and to all the Collateral as described in the Collateral Description section of this Agreement.

Default. The word "Default" means the Default set forth in this Agreement in the section titled "Default."

Environmental Laws. The words "Environmental Laws" mean any and all state, federal and local statutes, regulations and ordinances relating to the protection of human health or the environment, including without limitation the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. Section 9601, et seq. ("CERCLA"), the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 ("SARA"), the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801, et seq., the Resource Conservation and Recovery Act, 42 U.S.C. Section 6901, et seq., or other applicable state or federal laws, rules, or regulations adopted pursuant thereto.

Event of Default. The words "Event of Default" mean any of the events of default set forth in this Agreement in the default section of this Agreement.

Grantor. The word "Grantor" means Tri-Steel Construction Company, Inc..

Guarantor. The word "Guarantor" means any guarantor, surety, or accommodation party of any or all of the Indebtedness.

Guaranty. The word "Guaranty" means the guaranty from Guarantor to Lender, including without limitation a guaranty of all or part of the Note.

Hazardous Substances. The words "Hazardous Substances" mean materials that, because of their quantity, concentration or physical, chemical or infectious characteristics, may cause or pose a present or potential hazard to human health or the environment when improperly used, treated, stored, disposed of, generated, manufactured, transported or otherwise handled. The words "Hazardous Substances" are used in their very broadest sense and include without limitation any and all hazardous or toxic substances, materials or waste as defined by or listed under the Environmental Laws. The term "Hazardous Substances" also includes, without limitation, petroleum and petroleum by-products or any fraction thereof and asbestos.

Indebtedness. The word "Indebtedness" means the indebtedness evidenced by the Note or Related Documents, including all principal and interest together with all other indebtedness and costs and expenses for which Grantor is responsible under this Agreement or under any of the Related Documents. Specifically, without limitation, Indebtedness includes all amounts that may be indirectly secured by the Cross-Collateralization provision of this Agreement.

Lender. The word "Lender" means KeyBank National Association, its successors and assigns.

Note. The word "Note" means the Note executed by Tri-Steel Construction Company, Inc. in the principal amount of \$150,000.00 dated April 16, 2007, together with all renewals of, extensions of, modifications of, refinancings of, consolidations of, and substitutions for the note or credit agreement.

Property. The word "Property" means all of Grantor's right, title and interest in and to all the Property as described in the "Collateral Description" section of this Agreement.

Real Property. The words "Real Property" mean the real property, interests and rights, as further described in this Agreement.

Related Documents. The words "Related Documents" mean all promissory notes, credit agreements, loan agreements, environmental agreements, guaranties, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness.

GRANTOR HAS READ AND UNDERSTOOD ALL THE PROVISIONS OF THIS COMMERCIAL SECURITY AGREEMENT AND AGREES TO ITS TERMS. THIS AGREEMENT IS DATED APRIL 16, 2007.

GRANTOR:

TRI-STEEL CONSTRUCTION COMPANY, INC.

By: Deean Palmer
Deean Palmer, Secretary of Tri-Steel Construction Company, Inc.

By: Deean L. Palmer
Deean L. Palmer, President of Tri-Steel Construction Company, Inc.

UCC FINANCING STATEMENT

ELECTRONIC FILING*

A. NAME, PHONE, EMAIL, FAX OF CONTACT AT FILER: NATHAN ---- NATHAN J LEACH NATHAN.J.LEACH@KEYBANK.COM ----		IDAHO SECRETARY OF STATE 4/23/2007 13:53:13 \$3.00 Filing Number: B 2007-1024332-4 <small>THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY</small>			
B. SEND ACKNOWLEDGMENT TO: (Name and Address) KEYBANK NA					
1. DEBTOR'S EXACT FULL LEGAL NAME: - Insert only one debtor name (1a or 1b) - do not abbreviate or combine names					
1a. ORGANIZATION'S NAME: OR TRI-STEEL CONSTRUCTION COMPANY, INC.					
1b. LAST NAME:		FIRST NAME:	MIDDLE NAME:	SUFFIX:	
1c. MAILING ADDRESS: 1305 S 12TH W		CITY: REXBURG	STATE: ID	POSTAL CODE: 83440	COUNTRY: USA
1. TAX ID #: SSN/ORTIN	2. TYPE OF ORG: CORPORATION	3. JURISDICTION OF ORG: IDAHO	4. ORGANIZATIONAL ID #: (if any) C120860		
5. SECURED PARTY'S NAME: (or NAME of TOTAL ASSIGNEE of ASSIGNOR S/P) - insert only one secured party name (3a or 3b)					
3a. ORGANIZATION'S NAME: OR KEYBANK NATIONAL ASSOCIATION					
3b. LAST NAME:		FIRST NAME:	MIDDLE NAME:	SUFFIX:	
3c. MAILING ADDRESS: 110 E. MAIN STREET		CITY: REXBURG	STATE: ID	POSTAL CODE: 83440	COUNTRY: USA
6. This FINANCING STATEMENT covers the following collateral: ALL INVENTORY, EQUIPMENT, ACCOUNTS (INCLUDING BUT NOT LIMITED TO ALL HEALTH-CARE-INSURANCE RECEIVABLES), CHATTEL PAPER, INSTRUMENTS (INCLUDING BUT NOT LIMITED TO ALL PROMISSORY NOTES), LETTER-OF-CREDIT RIGHTS, LETTERS OF CREDIT, DOCUMENTS, DEPOSIT ACCOUNTS, INVESTMENT PROPERTY, MONEY, OTHER RIGHTS TO PAYMENT AND PERFORMANCE, AND GENERAL INTANGIBLES (INCLUDING BUT NOT LIMITED TO ALL SOFTWARE AND ALL PAYMENT INTANGIBLES); ALL OIL, GAS AND OTHER MINERALS BEFORE EXTRACTION; ALL OIL, GAS, OTHER MINERALS AND ACCOUNTS CONSTITUTING AS-EXTRACTED COLLATERAL; ALL FIXTURES; ALL TIMBER TO BE CUT; ALL ATTACHMENTS, ACCESSIONS, ACCESSORIES, FITTINGS, INCREASES, TOOLS, PARTS, REPAIRS, SUPPLIES, AND COMMINGLED GOODS RELATING TO THE FOREGOING PROPERTY, AND ALL ADDITIONS, REPLACEMENTS OF AND SUBSTITUTIONS FOR ALL OR ANY PART OF THE FOREGOING PROPERTY; ALL INSURANCE REFUNDS RELATING TO THE FOREGOING PROPERTY; ALL GOOD WILL RELATING TO THE FOREGOING PROPERTY; ALL RECORDS AND DATA AND EMBEDDED SOFTWARE RELATING TO THE FOREGOING PROPERTY, AND ALL EQUIPMENT, INVENTORY AND SOFTWARE TO UTILIZE, CREATE, MAINTAIN AND PROCESS ANY SUCH RECORDS AND DATA ON ELECTRONIC MEDIA; AND ALL SUPPORTING OBLIGATIONS RELATING TO THE FOREGOING PROPERTY; ALL WHETHER NOW EXISTING OR HEREAFTER ARISING, WHETHER NOW OWNED OR HEREAFTER ACQUIRED OR WHETHER NOW OR HEREAFTER SUBJECT TO ANY RIGHTS IN THE FOREGOING PROPERTY; AND ALL PRODUCTS AND PROCEEDS (INCLUDING BUT NOT LIMITED TO ALL INSURANCE PAYMENTS) OF OR RELATING TO THE FOREGOING PROPERTY.					
7. ALTERNATIVE DESIGNATION (if applicable): <input type="checkbox"/> LESSEE/LESSOR <input type="checkbox"/> CONSIGNEE/CONSIGNOR <input type="checkbox"/> BAILEE/BAILOB <input type="checkbox"/> SELLER/BUYER					
8. [] This FINANCING STATEMENT is to be filed (for record) (or recorded) in the REAL ESTATE RECORDS. Attach Addendum (if applicable)					
9. Check to REQUEST SEARCH REPORT(S) on Debtor(s) (ADDITIONAL FEE) (optional): <input type="checkbox"/> All Debtors <input type="checkbox"/> Debtor 1 <input type="checkbox"/> Debtor 2					
10. OPTIONAL FILER REFERENCE DATA: 5602420491 - 18					
*Electronically generated from original XML Document					

GIVENS PURSLEY LLP

LAW OFFICES
601 W. Bannock Street
PO Box 2720, Boise, Idaho 83701
TELEPHONE: 208 388-1200
FACSIMILE: 208 388-1300
WEBSITE: www.givenspursley.com

Amber N. Dina
Direct Dial: (208) 368-1244
E-Mail: amberdina@givenspursley.com

Gary G. Allen
Peter G. Barton
Christopher J. Beeson
Clint R. Bolinder
Erik J. Bolinder
Jeremy C. Chou
William C. Cole
Michael C. Creamer
Amber N. Dina
Elizabeth M. Donick
Kristin Bjorkman Dunn
Thomas E. Dvorak
Jeffrey C. Fereday
Justin M. Fredin
Martin C. Hendrickson
Steven J. Hippler
Donald E. Knickrehm
Debora K. Kristensen
Anne C. Kunkel
Michael P. Lawrence
Franklin G. Lee
David R. Lombardi
Emily L. McClure
Kenneth R. McClure
Kelly Greene McConnell
Cynthia A. Melillo
Christopher H. Meyer
L. Edward Miller
Patrick J. Miller
Judson B. Montgomery

Deborah E. Nelson
Kelsey J. Nunez
W. Hugh O'Riordan, LL.M.
Angela M. Reed
Justin A. Steiner
Conley E. Ward
Robert B. White

RETIRED
Kenneth L. Pursley
James A. McClure
Raymond D. Givens (1917-2008)

June 9, 2010

Via Facsimile

Madison County Sheriff, Civil Division
Attn: Sue Bagley
145 E. Main Street
Rexburg, ID 83440

Re: *KeyBank National Association v. Tri-Steel Construction Company*
Case No. CV-2010-0000191
Our File: 10894-2

Dear Ms. Bagley:

It is my understanding that the sale went forward today as scheduled despite KeyBank's objections. Please provide me with detailed accounting of the sale that includes a list of each item that was sold, the name and address of the purchaser and the price the purchaser paid for the item.

Sincerely,



Amber N. Dina

cc: Troy Evans, Madison County Prosecutor (via facsimile)
Thomas Dvorak (via email)
Bill Cole (via email)
Judy Johns (via e-mail)

PAPER TRANSACTION DETAIL**PAPER INFORMATION**

Paper ID: 201000459 Paper Type: *EX EXECUTION
 Status: SERVED Interest Rate: 5.63 Review Date: 06/15/2010
 Case No: CV09-5734 Court Date: 04/05/2010
 Title: PAL I LLC VS PALMER, DEAN & TRI STEEL CONSTRUCTION Judgment Date: 04/02/2010
 Court: BONNEVILLE

PAPER CHARGES

Date	Type	Type Description	Gross Amount	Adjustments	Net Amount
06/08/2010	01	PROCESS FEE	90.00		90.00
06/08/2010	05	POSTING NOTICES	15.00		15.00
06/08/2010	06	POSTAGE	11.59		11.59
06/08/2010	12	PROPERTY STORAGE	4,980.00		4,980.00
06/08/2010	20	MISCELLANEOUS	55.00	983.00 *	1,038.00
* ADJUSTMENTS CONSIST OF THE FOLLOWING:					
06/12/2010		SBAGLEY 611.00 FOR POST JUDGMENT COSTS AS PER BJ			
06/12/2010		SBAGLEY 372.00 FOR INVOICE # 8853 AS PER BJ			
06/08/2010	26	SHERIFF'S SALE	100.00		100.00
06/08/2010	39	COMMISSION	75.00	*	75.00
* ADJUSTMENTS CONSIST OF THE FOLLOWING:					
06/12/2010		SBAGLEY 0.00 CREDIT BID FOR HP # 10			
06/12/2010		SBAGLEY 0.00 DELL COMPUTER / KEY/ MOUSE # 18			
06/12/2010		SBAGLEY 0.00 POWER SHEERER # 8			
06/12/2010		SBAGLEY 0.00 SLEDGE HAMMER/ ROPE/ ROD # 32-38-35-36			
06/12/2010		SBAGLEY 0.00 4 ITEMS @ 10.00 FOR CERTIFICATE OF SALE			
06/12/2010		SBAGLEY 0.00 4 ITEMS @ 10.00 FOR CERTIFICATE OF SALE			
06/08/2010	40	GARNISHMENT	20,241.35	-460.00 *	19,781.35
* ADJUSTMENTS CONSIST OF THE FOLLOWING:					
06/12/2010		SBAGLEY -250.00 CREDIT BID FOR HP # 10			
06/12/2010		SBAGLEY -20.00 DELL COMPUTER / KEY/ MOUSE # 18			
06/12/2010		SBAGLEY -30.00 POWER SHEERER # 8			
06/12/2010		SBAGLEY -160.00 SLEDGE HAMMER/ ROPE/ ROD # 32-38-35-36			
06/11/2010	15	INTEREST	211.94		211.94
06/12/2010	09	RECORDING FEES	99.00		99.00
06/12/2010	17	SALE CERTIF.	330.00		330.00
TOTAL CHARGES:					26,731.88

PAYMENTS & DISBURSEMENTS

Date	Trans #	Payor	Source	Check No.	Type	Entered By	Void	Amount
06/12/2010	52728	BRIAN CHRISTENSEN	MONEY ORC	023911476	PAYMENT	SBAGLEY		18,075.00
	<u>Detail #</u>	<u>Transaction Code</u>	<u>Amount</u>	<u>Disbursed</u>	<u>Disbursed Date</u>	<u>Autodisburse</u>	<u>Overpay</u>	
	1	PROCESS FEE	90.00	No		No	No	
	2	RECORDING FEES	96.00	Yes	06/12/2010	No	No	
	3	PROPERTY STORAGE	4980.00	Yes	06/12/2010	No	No	
	4	POSTING NOTICES	15.00	No		No	No	
	5	POSTAGE	11.59	No		No	No	
	6	SALE CERTIF.	330.00	No		No	No	
	7	MISCELLANEOUS	55.00	Yes	06/12/2010	No	No	
	8	INTEREST	211.94	Yes	06/24/2010	Yes	No	
	9	SHERIFF'S SALE	100.00	No		No	No	
	10	GARNISHMENT	11133.47	Yes	06/24/2010	Yes	No	
	11	COMMISSION	66.00	No		No	No	
	12	MISCELLANEOUS	983.00	No		No	No	
	13	RECORDING FEES	3.00	Yes	06/16/2010	No	No	
06/12/2010	52729	L.A. PARKINSON	CHECK	7549	PAYMENT	SBAGLEY		15.00
	<u>Detail #</u>	<u>Transaction Code</u>	<u>Amount</u>	<u>Disbursed</u>	<u>Disbursed Date</u>	<u>Autodisburse</u>	<u>Overpay</u>	

P A P E R T R A N S A C T I O N D E T A I L

Paper ID: 201000459

Paper Type: *EX EXECUTION

Date	Trans #	Payor	Source	Check No.	Type	Entered By	Void	Amount
	1	GARNISHMENT		14.92	Yes	06/24/2010	Yes	No
	2	COMMISSION		0.08	No		No	No
06/12/2010	52730	BARNEY DAIRY INC	CHECK	3903	PAYMENT	SBAGLEY		60.00
	<u>Detail #</u>	<u>Transaction Code</u>		<u>Amount</u>	<u>Disbursed</u>	<u>Disbursed Date</u>	<u>Autodisburse</u>	<u>Overpay</u>
	1	GARNISHMENT		59.70	Yes	06/24/2010	Yes	No
	2	COMMISSION		0.30	No		No	No
06/12/2010	52731	BARNEY TOWING & RECOVE	CHECK	6514	PAYMENT	SBAGLEY		386.00
	<u>Detail #</u>	<u>Transaction Code</u>		<u>Amount</u>	<u>Disbursed</u>	<u>Disbursed Date</u>	<u>Autodisburse</u>	<u>Overpay</u>
	1	GARNISHMENT		384.07	Yes	06/24/2010	Yes	No
	2	COMMISSION		1.93	No		No	No
06/12/2010	52732	D.J BARNEY	CASH		PAYMENT	SBAGLEY		60.00
	<u>Detail #</u>	<u>Transaction Code</u>		<u>Amount</u>	<u>Disbursed</u>	<u>Disbursed Date</u>	<u>Autodisburse</u>	<u>Overpay</u>
	1	GARNISHMENT		59.70	Yes	06/24/2010	Yes	No
	2	COMMISSION		0.30	No		No	No
06/12/2010	52733	WILLIAM DAVIS	CHECK	4702	PAYMENT	SBAGLEY		85.00
	<u>Detail #</u>	<u>Transaction Code</u>		<u>Amount</u>	<u>Disbursed</u>	<u>Disbursed Date</u>	<u>Autodisburse</u>	<u>Overpay</u>
	1	GARNISHMENT		84.57	Yes	06/24/2010	Yes	No
	2	COMMISSION		0.43	No		No	No
06/12/2010	52734	LOIS DAVIS	CASH		PAYMENT	SBAGLEY		317.00
	<u>Detail #</u>	<u>Transaction Code</u>		<u>Amount</u>	<u>Disbursed</u>	<u>Disbursed Date</u>	<u>Autodisburse</u>	<u>Overpay</u>
	1	GARNISHMENT		315.41	Yes	06/24/2010	Yes	No
	2	COMMISSION		1.59	No		No	No
06/12/2010	52735	ARK ELECTRIC	CHECK	2304	DISBURSE	SBAGLEY		55.00
	<u>Detail #</u>	<u>Transaction Code</u>		<u>Amount</u>	<u>Disbursed</u>	<u>Disbursed Date</u>	<u>Autodisburse</u>	<u>Overpay</u>
	1	MISCELLANEOUS		55.00	No	06/12/2010	No	No
06/12/2010	52736	BARNEY TOWING & RECOVE	CHECK	2305	DISBURSE	SBAGLEY		4,980.00
	<u>Detail #</u>	<u>Transaction Code</u>		<u>Amount</u>	<u>Disbursed</u>	<u>Disbursed Date</u>	<u>Autodisburse</u>	<u>Overpay</u>
	1	PROPERTY STORAGE		4980.00	No	06/12/2010	No	No
06/12/2010	52737	MADISON COUNTY RECORDI	CHECK	2306	DISBURSE	SBAGLEY		96.00
	<u>Detail #</u>	<u>Transaction Code</u>		<u>Amount</u>	<u>Disbursed</u>	<u>Disbursed Date</u>	<u>Autodisburse</u>	<u>Overpay</u>
	1	RECORDING FEES		96.00	No	06/12/2010	No	No
06/16/2010	52756	DELL RAY BARNEY	MONEY ORD	023911477	PAYMENT	SBAGLEY		4,625.00
	<u>Detail #</u>	<u>Transaction Code</u>		<u>Amount</u>	<u>Disbursed</u>	<u>Disbursed Date</u>	<u>Autodisburse</u>	<u>Overpay</u>
	1	GARNISHMENT		4620.63	Yes	06/24/2010	Yes	No
	2	COMMISSION		4.37	No		No	No
06/16/2010	52757	MADISON COUNTY RECORDI	CHECK	2308	DISBURSE	SBAGLEY		3.00
	<u>Detail #</u>	<u>Transaction Code</u>		<u>Amount</u>	<u>Disbursed</u>	<u>Disbursed Date</u>	<u>Autodisburse</u>	<u>Overpay</u>
	1	RECORDING FEES		3.00	No	06/16/2010	No	No
06/24/2010	52846	SMITH DRISCOLL & ASSOCIA	AUTODISBUI	2344	DISBURSE	SBAGLEY		16,884.41
	<u>Detail #</u>	<u>Transaction Code</u>		<u>Amount</u>	<u>Disbursed</u>	<u>Disbursed Date</u>	<u>Autodisburse</u>	<u>Overpay</u>
	1	INTEREST		211.94	No	06/24/2010	No	No
	2	GARNISHMENT		11133.47	No	06/24/2010	No	No
	3	GARNISHMENT		14.92	No	06/24/2010	No	No
	4	GARNISHMENT		59.70	No	06/24/2010	No	No
	5	GARNISHMENT		384.07	No	06/24/2010	No	No
	6	GARNISHMENT		59.70	No	06/24/2010	No	No
	7	GARNISHMENT		84.57	No	06/24/2010	No	No
	8	GARNISHMENT		315.41	No	06/24/2010	No	No
	9	GARNISHMENT		4620.63	No	06/24/2010	No	No
TOTAL								1,604.59

PAPER TRANSACTION DETAIL

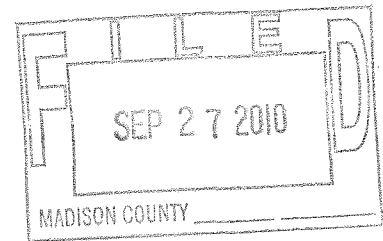
Paper ID: 201000459 Paper Type: *EX EXECUTION

BALANCE INFORMATION

Total Charges: 26,731.88 Total Paid: 23,623.00 Total Due: 3,108.88 Uncollectable: 0.00

*****END OF REPORT*****

Bryan D. Smith, Esq. – ISBN 4411
B. J. Driscoll, Esq. – ISBN 7010
SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Ave.
P.O. Box 50731
Idaho Falls, Idaho 83405
Telephone: (208) 524-0731
Facsimile: (208) 529-4166



Attorneys for Defendant
PAL I, LLC

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION, a
national banking association,

Plaintiff,

v.

PAL I, LLC, an Idaho limited liability
company; BRIAN CHRISTENSEN, an
individual; L.A. PARKINSON, an individual;
BARNEY DAIRY, INC.; D.J. BARNEY, an
individual; WILLIAM DAVIS, an individual;
LOIS DAVIS, an individual; DELL RAY
BARNEY, an individual; and DELL J.
BARNEY, an individual, dba Barney Towing
& Recovery,

Defendants.

Case No. CV-2010-680

ANSWER AND JURY DEMAND

COMES NOW the defendant, PAL I, LLC (hereinafter "PAL"), and in answer to
plaintiff's Complaint admits, denies, alleges, and avers as follows:

FIRST DEFENSE

1. Plaintiff's complaint fails to state a cause of action upon which relief can
be granted.

SECOND DEFENSE

2. PAL denies each and every allegation of said plaintiff's complaint not herein specifically admitted.

THIRD DEFENSE

3. Answering paragraphs 2, 11, and 35-36, PAL admits the same.

4. Answering paragraphs 40, 42, 50, and 55, PAL denies the same.

5. Answering paragraphs 1, 3-10, 12-14, 16-18, 20-29, 31, 33-34, 39, 46, 48-49, 54, and 59-60, PAL is without knowledge or information sufficient to form a belief as to the truth of the averments in these paragraphs, and therefore denies the same.

6. Answering paragraphs 15 and 19, the Idaho Secretary of State's records speak for themselves. PAL denies the remaining allegations of these paragraphs.

7. Answering paragraph 30, PAL admits that it did not instruct the Sheriff to postpone the sale scheduled for June 9, 2010, or to hold the sale proceeds in a trust account. PAL is without knowledge or information sufficient to form a belief as to the truth of the remaining averments in this paragraph, and therefore denies the same.

8. Answering paragraph 32, PAL admits that the Madison County Sheriff's Office conducted the sale scheduled for June 9, 2010, and did not hold the sale proceeds in trust. PAL is without knowledge or information sufficient to form a belief as to the truth of the remaining averments in this paragraph, and therefore denies the same.

9. Answering paragraphs 37, 44, 52, and 57, PAL incorporates by reference its responses to the foregoing paragraphs as set forth herein.

10. Answering paragraphs 38 and 47, these are statements of law to which no response is required.

11. Answering paragraph 41, PAL admits that it has a right to and is the legitimate owner of the proceeds from the June 9, 2010 sale by the Madison County Sheriff's Office, not plaintiff. PAL denies the remaining averments in this paragraph.

12. Answering paragraphs 43, 51, 56, and 61, these are statements of plaintiff's requests to the court to which no response is required.

13. Answering paragraphs 45, 53, and 58, these are statements of plaintiff's intent to which no response is required.

14. PAL denies the averments in the unnumbered paragraph regarding plaintiff's "Attorneys' Fees."

AFFIRMATIVE DEFENSES

1. AS A SEPARATE AND FURTHER DEFENSE, PAL alleges that plaintiff has failed to mitigate its damages, and that any and all damages, as alleged by the plaintiff, which are expressly denied, resulted from said failure to mitigate.

2. AS A SEPARATE AND FURTHER DEFENSE, PAL alleges that plaintiff's claims are barred by the doctrine of waiver.

3. AS A SEPARATE AND FURTHER DEFENSE, PAL alleges that plaintiff's claims are barred by the doctrine of estoppel.

4. AS A SEPARATE AND FURTHER DEFENSE, PAL alleges that the complaint and each and every separate cause of action contained therein is barred in whole or in part by reason of plaintiff's unclean hands.

5. AS A SEPARATE AND FURTHER DEFENSE, PAL alleges that plaintiff's damages, if any, were proximately caused by the actions or omissions of other persons, firms, corporations or entities and not by PAL.

6. AS A SEPARATE AND FURTHER DEFENSE, PAL alleges that plaintiff's claims are barred by plaintiff's failure to comply with the statutory requirements of Idaho Code Section 11-203.

7. AS A SEPARATE AND FURTHER DEFENSE, PAL alleges that plaintiff failed to use ordinary care, caution, or prudence for the safety and protection of plaintiff's property or rights, and said failure on plaintiff's own part proximately caused and contributed to the happening of the events and damages plaintiff now complains of, if any there actually were.

WHEREFORE, PAL I, LLC prays judgment as follows:

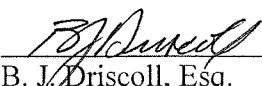
1. That plaintiff's complaint be dismissed and that it take nothing thereby;
2. That PAL recover its reasonable attorney's fees and costs incurred in defending plaintiff's complaint pursuant to Idaho Code Section 12-120(1) and 12-121, and Idaho Rules of Civil Procedure 54; and
3. For such other and further relief as to the Court appears just and equitable in the premises.

DEMAND FOR JURY TRIAL

COMES NOW the defendant, PAL I, LLC, and makes demand for a jury trial of all issues herein pursuant to Rule 38 of the Idaho Rules of Civil Procedure.

DATED this 24 day of September, 2010.

SMITH, DRISCOLL & ASSOCIATES, PLLC




B. J. Driscoll, Esq.
Attorneys for Plaintiff

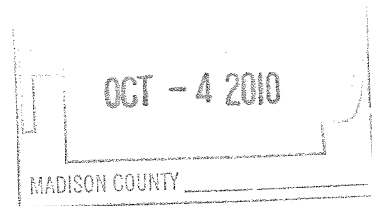
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24 day of September, 2010, I caused a true and correct copy of the foregoing **ANSWER AND JURY DEMAND** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

Thomas E. Dvorak, Esq. Amber N. Dina, Esq. GIVENS PURSLEY, LLP 601 West Bannock Street Post Office Box 2720 Boise, Idaho 83701-2720 Facsimile: 208-388-1300	<input checked="" type="checkbox"/> U. S. Mail <input type="checkbox"/> Fax <input type="checkbox"/> Overnight Delivery <input type="checkbox"/> Hand Delivery
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B. J. Driscoll

Bryan D. Smith, Esq. – ISBN 4411
B. J. Driscoll, Esq. – ISBN 7010
SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Ave.
P.O. Box 50731
Idaho Falls, Idaho 83405
Telephone: (208) 524-0731
Facsimile: (208) 529-4166



Attorneys for Defendant
PAL I, LLC

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION, a
national banking association,

Plaintiff,

v.

PAL I, LLC, an Idaho limited liability
company; BRIAN CHRISTENSEN, an
individual; L.A. PARKINSON, an individual;
BARNEY DAIRY, INC.; D.J. BARNEY, an
individual; WILLIAM DAVIS, an individual;
LOIS DAVIS, an individual; DELL RAY
BARNEY, an individual; and DELL J.
BARNEY, an individual, dba Barney Towing
& Recovery,

Defendants.

Case No. CV-2010-680

**MOTION FOR SUMMARY
JUDGMENT**

COMES NOW the defendant, PAL I, LLC (hereinafter "PAL"), by and through
its counsel of record, and pursuant to Idaho Rule of Civil Procedure 56 moves the court
for an order granting PAL summary judgment against all claims of the defendant,
KeyBank National Association ("KeyBank").

This motion is made on the grounds and reasons that there is no genuine issue of
material fact that KeyBank lost the priority of its security interest in the property sold by


the Madison County Sheriff's Office by failing to comply with the mandatory claim of exemption procedures of Idaho Code Section 11-203. As such, PAL is entitled to judgment as a matter of law.

This motion is based on this Motion, the Brief in Support of Motion for Summary Judgment, the Affidavit of Suzanne Bagley, the Affidavit of B. J. Driscoll, and the Notice of Hearing filed concurrently herewith, and on the court's records and files herein.

The plaintiff requests oral argument.

DATED this 4 day of October, 2010.

SMITH, DRISCOLL & ASSOCIATES, PLLC

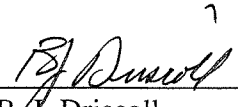

B. J. Driscoll, Esq.
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4 day of October, 2010, I caused a true and correct copy of the foregoing **MOTION FOR SUMMARY JUDGMENT** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

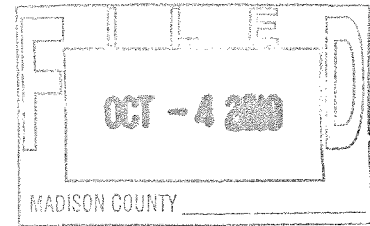
Thomas E. Dvorak, Esq.
Amber N. Dina, Esq.
GIVENS PURSLEY, LLP
601 West Bannock Street
Post Office Box 2720
Boise, Idaho 83701-2720
Facsimile: 208-388-1300

☐ U. S. Mail
☒ Fax
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B. J. Driscoll

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B. J. Driscoll, Esq. – ISBN 7010
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414 Shoup Ave.
P.O. Box 50731
Idaho Falls, Idaho 83405
Telephone: (208) 524-0731
Facsimile: (208) 529-4166

Attorneys for Defendant
PAL I, LLC



IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION, a
national banking association,

Plaintiff,

v.

PAL I, LLC, an Idaho limited liability
company; BRIAN CHRISTENSEN, an
individual; L.A. PARKINSON, an individual;
BARNEY DAIRY, INC.; D.J. BARNEY, an
individual; WILLIAM DAVIS, an individual;
LOIS DAVIS, an individual; DELL RAY
BARNEY, an individual; and DELL J.
BARNEY, an individual, dba Barney Towing
& Recovery,

Defendants.

Case No. CV-2010-680

**BRIEF IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT**

I. INTRODUCTION.

The plaintiff, PAL I, LLC ("PAL"), files this brief in support of its motion for summary judgment against the defendant, KeyBank National Association ("KeyBank").

As explained more fully below, there is no genuine issue of material fact and PAL is entitled to judgment as a matter of law against KeyBank's claims.

II. SUMMARY JUDGMENT STANDARD.

In *State v. Shama Resources Ltd. Partnership*, 127 Idaho 267, 270 (1995), the Idaho Supreme Court explained when the court should grant summary judgment:

Summary judgment is proper “if the pleadings, depositions, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” I.R.C.P. 56(c). The party moving for summary judgment bears the burden of establishing the absence of a genuine issue of material fact. *Tingley v. Harrison*, 125 Idaho 86, 89, 867 P.2d 960, 963 (1994); *Harris v. Department of Health & Welfare*, 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992). Once the moving party establishes the absence of a genuine issue, the burden shifts to the nonmoving party to make a showing of the existence of a genuine issue of material fact on the elements challenged by the moving party. *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 530-31, 887 P.2d 1034, 1037-38 (1994). I.R.C.P. 56(c) requires the entry of summary judgment against a nonmoving party who “fails to make a showing sufficient to establish the existence of an element essential to that party’s case and in which that party will bear the burden of proof at trial.” *Olsen v. J. A. Freeman*, 117 Idaho 706, 720-21, 791 P.2d 1285, 1299-1300 (1990) (citing *Celotex v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986)). See *Hecla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 778, 784, 839 P.2d 1192, 1198 (1992).

III. STATEMENT OF UNDISPUTED MATERIAL FACTS.

On April 2, 2010, PAL recovered a judgment against Tri-Steel Construction Company, Inc. (“Tri-Steel”), in the amount of \$20,224.00 in Bonneville County Case No. CV-09-5734.¹ PAL obtained a writ of execution against Tri-Steel and delivered it to the Madison County Sheriff’s Office (“Sheriff’s Office”) for execution.²

Following execution of the writ against property owned by Tri-Steel, on April 26, 2010, the Sheriff’s Office mailed the third-party claim of exemption form and copies of the other execution documents to KeyBank’s local branch office located at 110 E. Main

¹ See Exhibit “A” to the Affidavit of B. J. Driscoll filed concurrently herewith.

² See the Affidavit of B. J. Driscoll filed concurrently herewith, and Exhibit “B” attached thereto.

Street, Rexburg, ID 83440.³ The Sheriff's Office also mailed the third-party claim of exemption form and other execution documents to KeyBank's office at 702 W. Idaho, Boise, ID 83702.⁴ By May 10, 2010, the Sheriff's Office had not received any third-party claim of exemption forms back from KeyBank.⁵

IV. THE COURT SHOULD GRANT SUMMARY JUDGMENT TO PAL BECAUSE KEYBANK FAILED TO FILE A THIRD-PARTY CLAIM EXEMPTION AS REQUIRED BY IDAHO CODE SECTION 11-203.

Idaho Code Section 11-203 provides in pertinent part as follows:

The following procedures *shall* apply to a claim by the defendant or the defendant's representative that property levied upon is exempt and *to any claim by a third party* that property levied upon is his property or *that he has a security interest therein*. The defendant or the defendant's representative shall complete the claim of exemption form as provided in section 8-507C, Idaho Code. *A third party claimant shall prepare a written claim* setting forth the grounds upon which he claims the property, *and in the case of a secured party, also stating the dollar amount of the claim*. A claim of exemption or third party claim may be filed only if property has been levied upon.

(a) The claim of exemption or third party claim *shall* be delivered or mailed to the sheriff *within fourteen (14) days after the date the sheriff* hand delivers or mails the documents required to be served upon the defendant and third parties under section 8-507A, Idaho Code. If the claim is mailed, it *must be received by the sheriff within the fourteen (14) day period*. . .

(Emphasis added.) Moreover, Section 11-203(c) instructs the sheriff to "refuse to accept or honor" a debtor's claim of exemption if "not filed with him" within the applicable time period. Likewise, the statute instructs the officer to disregard a creditor's attempt to contest a claim of exemption if the creditor "fails to notify the sheriff within the time provided." *Id.* In other words, under Idaho's statute, if any party fails to timely comply

³ See Affidavit of Suzanne Bagley filed concurrently herewith.

⁴ See Affidavit of Suzanne Bagley filed concurrently herewith.

⁵ See Affidavit of Suzanne Bagley filed concurrently herewith.

with the procedure, that party waives its rights under the statute and the officer must proceed with the execution process.

Importantly, the scope of Section 11-203 is very broad. The statute does not say that certain types of exemptions are not subject to the procedure, or that some exemptions may be claimed through a different procedure. The statute does not provide that certain types of property are “automatically exempt.” The statute does not permit persons to claim an exemption “in their head,” but requires compliance with the written notice, filing, and service procedures to provide due process to other interested parties. More particularly applied to secured parties, the statute requires a statement of the dollar amount of the claim. In sum, Section 11-203 broadly states that its claim of exemption procedures “shall apply” to the defendant, the defendant’s representative, and to any third parties claiming any interest in the levied property, including secured parties. Section 11-203 does not exclude any particular type of levy, type of property, or type of exemption from its mandatory procedures.

Additionally, several courts and other authorities acknowledge that the right to claim property as exempt is a right that may be waived. “The exemption is an affirmative defense which may be relied upon only as a matter of privilege; it is not a vested right and the right to assert it may be waived.” *D’Avignon v. Graham*, 823 P.2d 929, 932 (N.M.App. 1991) (citing 31 AM.JUR.2D *Exemptions* § 1 (1989) and 35 C.J.S. *Exemptions* § 1 (1960)); see also *In re Marriage of Thompson*, 158 Cal.Rptr. 160, 163 (Cal.App. 1979); *Pappas v. Capps*, 83 Colo. 222, 224, 263 P. 411, 411 (1928) (stating “exemption is a personal privilege that may be asserted or waived”); and *Church v. First Nat. Bank*, 238 N.W. 192, 194 (1931) (stating it is “beyond question” that a person may waive a

right to an exemption in personal property). More specifically, a person may waive an exemption in levied property. “Whatever view the courts may take as to the right of a debtor to waive his exemptions . . . in so far at least as a particular exemption is a purely personal right of the debtor, he may waive it at the time of the levy or thereafter . . .” *State v. Goering*, 392 P.2d 930, 933 (1964) (quoting 22 AM.JUR. *Exemptions*, § 135, p. 103).

Here, the Sheriff’s Office mailed the third-party claim of exemption form to not one, but two KeyBank offices on April 26, 2010.⁶ In its complaint, KeyBank alleges that it was a secured party and held a security interest in the Tri-Steel property seized by the Sheriff’s Office pursuant to PAL’s writ of execution.⁷ As a secured party, KeyBank is subject to several specific, mandatory obligations under Section 11-203. However, KeyBank did not file a written third-party claim of exemption with the Sheriff’s office, did not state the dollar amount of its claim, and did not deliver it to the Sheriff’s Office within 14 days after the sheriff mailed the packets to KeyBank’s Rexburg and Boise offices.⁸ In short, KeyBank failed to comply with any of Section 11-203’s requirements.

At least one court has expressly held that a secured party’s failure to state the dollar amount of its secured claim following levy results in the secured party losing its priority in the collateral. In *Fiester v. Production Credit Association*, 426 N.W.2d 676 (Iowa App. 1988), the appellate court affirmed the trial court’s determination that a secured party’s failure to comply with the statutory obligation to “furnish a statement of the amount of indebtedness resulted in the loss of the secured party’s priority.” *Id.* The

⁶ See Affidavit of Suzanne Bagley filed concurrently herewith.

⁷ See ¶¶ 12-19, 22 of the Complaint for Quiet Title or Alternatively for Creditor’s Bill filed August 16, 2010, already on file with the court.

⁸ See Affidavit of Suzanne Bagley filed concurrently herewith.

applicable Iowa statute permitted a judgment creditor to demand that a secured party produce a written statement of the amount of the debt. *Id.* at 677. The secured creditor argued that the judgment creditor's "knowledge of the security interest alone is all that is necessary" to preserve the secured party's priority in the collateral. *Id.* However, the *Fiester* court rejected that argument. Instead, the court relied on the plain language of the statute requiring the secured party to provide a statement of the indebtedness. "The purpose of the statement under Section 626.42 is to give the [judgment] creditor the facts so he can determine whether he should release his levy, pay off the secured party or contest the amount or validity of the security interest." *Id.* The court continued, "The mere communication by [the secured creditor] of the existence of a security interest in the beans is insufficient to meet the requirements of the statute."

Likewise, this court should recognize that KeyBank's failure to comply with Section 11-203's requirement that it must "prepare a written claim . . . stating the dollar amount of the claim," results in KeyBank losing its priority in the collateral just like the secured party in *Fiester*. KeyBank's failure to timely and properly assert its security interest deprived PAL of the opportunity to determine whether to release the levy, pay off Tri-Steel's debt to KeyBank, or to contest the amount or validity of KeyBank's security interest. *See Fiester, supra.* KeyBank's April 28, 2010 letter to PAL's counsel "is insufficient to meet the requirements of" Section 11-203. *Id.*

Allowing the sheriff to sell property with a clear title where no claim of exemption has been filed promotes several important policies. Sale of the property free and clear helps to ensure that the sale will stimulate bidding and bring the highest price. A contrary rule allowing unasserted security interests to remain attached to the property

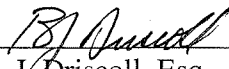
would discourage bidding and suppress the sale price. Further, it would subject unsuspecting purchasers to the exact type of claims that KeyBank asserts in this action. Prospective bidders would have to conduct their own lien searches before bidding, which would impede active bidding.

V. CONCLUSION.

The record is undisputed that KeyBank failed to comply with the specific, mandatory procedures of Idaho Code Section 11-203 by not filing a third-party claim of exemption form with the Sheriff's Office within 14 days of the Sheriff's Office mailing the forms to KeyBank's offices in Rexburg and Boise. KeyBank's noncompliance prevents it from now claiming a superior interest in the Tri-Steel property sold by the Sheriff's Office in satisfaction of PAL's prior judgment. Because all of KeyBank's claims against PAL and claims to the Tri-Steel property sold by the Sheriff's Office are based on the priority of its security interest, and because it failed to assert its security interest in the manner prescribed by Section 11-203, KeyBank lost the priority of its security interest and the court should grant PAL's motion for summary judgment against KeyBank's claims.

DATED this 4 day of October, 2010.

SMITH, DRISCOLL & ASSOCIATES, PLLC



B. J. Driscoll, Esq.
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4 day of October, 2010, I caused a true and correct copy of the foregoing **BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

Thomas E. Dvorak, Esq.
Amber N. Dina, Esq.
GIVENS PURSLEY, LLP
601 West Bannock Street
Post Office Box 2720
Boise, Idaho 83701-2720
Facsimile: 208-388-1300

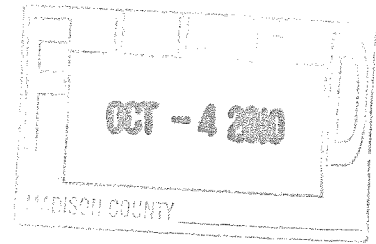
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B. J. Driscoll

Bryan D. Smith, Esq. – ISBN 4411
B. J. Driscoll, Esq. – ISBN 7010
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414 Shoup Ave.
P.O. Box 50731
Idaho Falls, Idaho 83405
Telephone: (208) 524-0731
Facsimile: (208) 529-4166

Attorneys for Defendant
PAL I, LLC



IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION, a
national banking association,

Plaintiff,

v.

PAL I, LLC, an Idaho limited liability
company; BRIAN CHRISTENSEN, an
individual; L.A. PARKINSON, an individual;
BARNEY DAIRY, INC.; D.J. BARNEY, an
individual; WILLIAM DAVIS, an individual;
LOIS DAVIS, an individual; DELL RAY
BARNEY, an individual; and DELL J.
BARNEY, an individual, dba Barney Towing
& Recovery,

Defendants.

Case No. CV-2010-680

**AFFIDAVIT OF SUZANNE
BAGLEY**

STATE OF IDAHO)
) ss.
County of MADISON)

SUZANNE BAGLEY, being first duly sworn upon oath, states and deposes as
follows:

1. I am over the age of 21, and I make this affidavit on personal knowledge.

2. I am a civil deputy for the Madison County Sheriff's Office and have worked in this capacity since July 15, 2008.

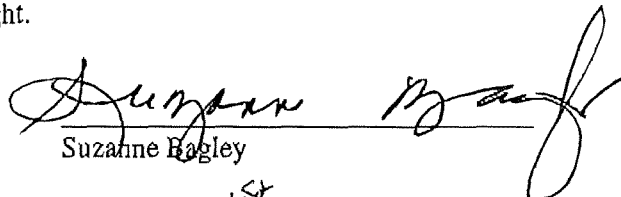
3. I have been the primary deputy involved in handling the executions and sales in PAL I, LLC v. Tri-Steel Construction Co., Inc., Bonneville County Case No. CV-09-5734.

4. On April 26, 2010, I mailed a third-party claim of exemption packet to KeyBank National Association at the local branch office in Rexburg, Idaho. The envelope was addressed to KeyBank National Association, 110 E. Main Street, Rexburg, ID 83440.

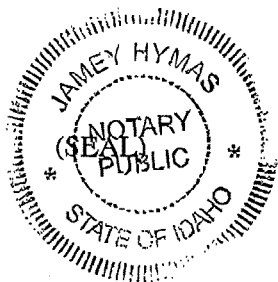
5. That same day, I also mailed a third-party claim of exemption packet to KeyBank National Association to the office in Boise, Idaho. The envelope was addressed to KeyBank National Association, 702 W. Idaho, Boise, ID 83702.

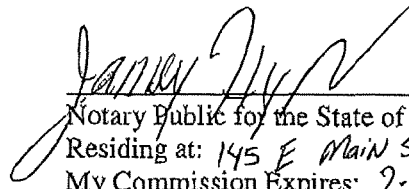
6. Fourteen days after I mailed the third-party claim of exemption packets to KeyBank's offices, the Madison County Sheriff's Office had not received any third-party claim of exemption forms from KeyBank National Association.

Further sayeth your affiant naught.


Suzanne Bagley

SUBSCRIBED AND SWORN TO before me this 1st day of October, 2010.



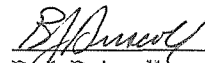

Notary Public for the State of Idaho
Residing at: 145 E Main St Rexburg ID 83440
My Commission Expires: 2-28-2013

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4 day of October, 2010, I caused a true and correct copy of the foregoing **AFFIDAVIT OF SUZANNE BAGLEY** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

Thomas E. Dvorak, Esq.
Amber N. Dina, Esq.
GIVENS PURSLEY, LLP
601 West Bannock Street
Post Office Box 2720
Boise, Idaho 83701-2720
Facsimile: 208-388-1300

☐ U. S. Mail
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B.J. Driscoll

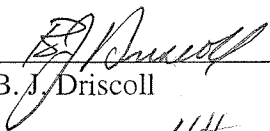
FILED
OCT - 4 2010
MADISON COUNTY

AFFIDAVIT OF BJ DRISCOLL
PAGE 86

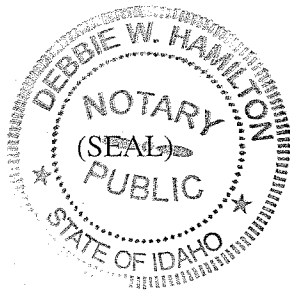
2. Attached hereto and marked as Exhibit "A" is a true and correct copy of the judgment recovered by PAL I, LLC, against Tri-Steel Construction Company, Inc., in the amount of \$20,224.00 in Bonneville County Case No. CV-09-5734.

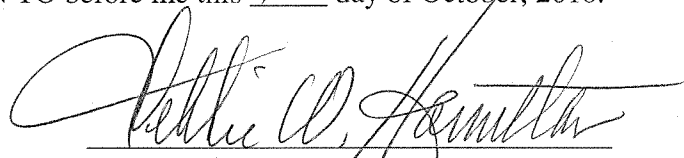
3. Attached hereto and marked as Exhibit "B" is a true and correct copy of the writ of execution issued by the court on the judgment attached as Exhibit "A," which my office delivered to the Madison County Sheriff's Office for service and execution.

Further sayeth your affiant naught.


B.J. Driscoll

SUBSCRIBED AND SWORN TO before me this 4th day of October, 2010.




Notary Public for the State of Idaho
Residing at: Idaho Falls, ID
My Commission Expires:

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4 day of October, 2010, I caused a true and correct copy of the foregoing **AFFIDAVIT OF B. J. DRISCOLL** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

Thomas E. Dvorak, Esq.
Amber N. Dina, Esq.
GIVENS PURSLEY, LLP
601 West Bannock Street
Post Office Box 2720
Boise, Idaho 83701-2720
Facsimile: 208-388-1300

☐ U. S. Mail
☒ Fax
☐ Overnight Delivery
☐ Hand Delivery



B. J. Driscoll

Exhibit “A”

RECEIVED APR - 5 2010

FILED IN CHAMBERS AT BLACKFOOT,
BINGHAM COUNTY, IDAHO

April 3, 2010
AT *3:49 p.m.*

Darren B. Simpson
DARREN B. SIMPSON
DISTRICT JUDGE

Bryan D. Smith, Esq. – ISB #4411
B. J. Driscoll, Esq. – ISB #7010
SMITH, DRISCOLL & ASSOCIATES PLLC
414 Shoup Ave.
P.O. Box 50731
Idaho Falls, Idaho 83405
Telephone: (208) 524-0731
Facsimile: (208) 529-4166

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

PAL I, LLC, an Idaho Limited Liability
Company,

Plaintiff,

v.

DEAN PALMER, individually, and TRI-
STEEL CONSTRUCTION COMPANY,
INC., an Idaho corporation,

Defendants.

Case No. CV-09-5734

DEFAULT JUDGMENT

The Defendant, TRI-STEEL CONSTRUCTION COMPANY, INC., having failed to appear through counsel on or before March 17, 2010 pursuant to this court's order dated February 25, 2010, and it appearing by the Application for Entry of Default Judgment, Affidavit of Bryan D. Smith, Attorney for Plaintiff, and the court's records and files, that plaintiff is entitled to a judgment herein;

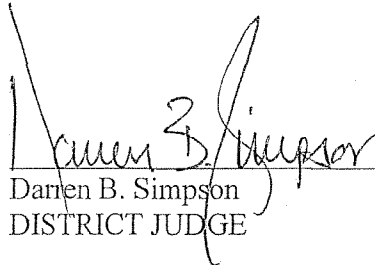
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff have and recover from the defendant the sum of \$2,224.00 said amount being itemized as follows,

to-wit:

Principal	\$17,200.00
Interest	\$ <u>0.00</u>
Attorney's fee	\$ <u>2,500.00</u>
Filing fee - Complaint	\$ 88.00
Service fee	\$ 64.00
Deposition fees	\$ -372.00
Amount Paid	\$ <u>-0.00</u>
 TOTAL:	 \$ <u>20,224.00</u>

Upon which sum interest shall accrue at the rate provided by law, and upon which judgment execution may issue.

DATED this 2ND day of ^{April}~~March~~, 2010.


 Darlen B. Simpson
 DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I am the Clerk of the above-entitled court, and that on the 2nd day of April, 2010 I served a true and correct copy of the foregoing **DEFAULT JUDGMENT** on the persons listed below by mailing, with the correct postage thereon, or by causing the same to be hand delivered.

Persons served:

Bryan D. Smith, Esq.
Smith, Driscoll & Associates, PLLC
P. O. Box 50731
Idaho Falls, Idaho 83405-0731

() Hand ☒ Mail

Tri-Steel Construction Company, Inc.
949 N. 12th W.
Rexburg, Idaho 83440

() Hand ☒ Mail

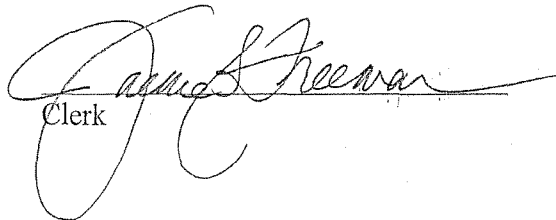

Clerk

Exhibit “B”

Bryan D. Smith, Esq. – ISB #4411
B. J. Driscoll, Esq. – ISB #7010
SMITH, DRISCOLL & ASSOCIATES PLLC
414 Shoup Ave.
P.O. Box 50731
Idaho Falls, Idaho 83405
Telephone: (208) 524-0731
Facsimile: (208) 529-4166

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

PAL I, LLC, an Idaho Limited Liability
Company,

Plaintiff,

v.

DEAN PALMER, individually, and TRI-
STEEL CONSTRUCTION COMPANY,
INC., an Idaho corporation,

Defendants.

Case No. CV-09-5734

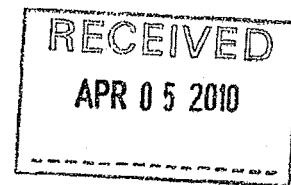
WRIT OF EXECUTION

THE PEOPLE OF THE STATE OF IDAHO

To the Sheriff of the County of Madison

GREETINGS:

Judgment	\$ 20,224.00
Interest	\$ 9.35
Costs	\$ 8.00
Payments	\$ 0.00
Total	\$ 20,241.35



WHEREAS, on the 2nd day of April, 2010, PAL I, LLC, an Idaho Limited Liability Company, as Plaintiff recovered judgment in the District Court in the said County of Bonneville, against defendant **TRI-STEEL CONSTRUCTION COMPANY, INC.**, for

the sum of \$20,224.00, with interest t the legal rate for judgments as prescribed by Idaho Code § 28-22-104 until paid, together with costs and disbursements at the date of said judgment and accruing costs as appear to us on record.

AND WHEREAS, the judgment role in the action in which said judgment was entered is filed in the Clerk's office of said Court in said County of Bonneville, and the said judgment was docketed in said Clerk's office in the said County, on the day and year first above written.

And the sum of \$20,224.00 with interest in the amount of \$9.35, plus costs of \$8.00, less payments of \$0.00 for a total of \$20,241.35 is now—as of April 5, 2010 actually due on said judgment.

NOW, THEREFORE, YOU, the said Sheriff, are hereby required to take the said sums due on said judgment and interest, and costs accruing, and your costs, to satisfy said judgment in full out of the personal property of said debtor, or if sufficient personal property cannot be found, then out of the real property in your County belonging to him on the day whereon said judgment was docketed in your County, or at any time thereafter; and make your return of the writ within sixty (60) days after your receipt hereof, with what you have done endorsed thereon.

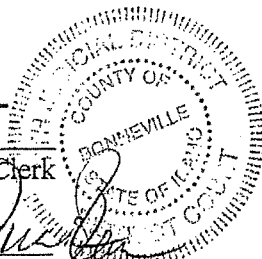
WITNESS HON. Darren B. Simpson
JUDGE of said District Court at the
Courthouse in the County of Bonneville, this
5th day of April, 2010.

ATTEST: my hand and
seal of said Court the
day and year last above
written.

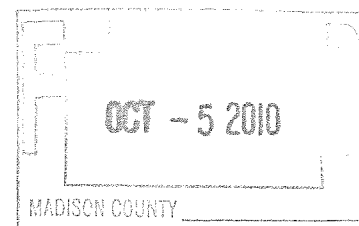
Ronald Longmore

By

Ronda [Signature]
Deputy Clerk



Thomas E. Dvorak (ID State Bar ID# 5043)
Amber N. Dina (ID State Bar ID# 7708)
GIVENS PURSLEY LLP
601 West Bannock Street
Post Office Box 2720
Boise, Idaho 83701-2720
Telephone: 208-388-1200
Facsimile: 208-388-1300
980059_1 [10894-2]



Attorneys for KeyBank National Association

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT FOR THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION, a
national banking association,

Plaintiff,

v.

PAL I, LLC, an Idaho limited liability
company; BRIAN CHRISTENSEN, an
individual; L.A. PARKINSON, an individual;
BARNEY DAIRY, INC.; D.J. BARNEY, an
individual; WILLIAM DAVIS, an individual;
LOIS DAVIS, an individual; DELL RAY
BARNEY, an individual; and DELL J.
BARNEY, an individual, dba Barney Towing
& Recovery,

Defendants.

Case No. CV 10-680

**PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
AGAINST PAL I**

Plaintiff KeyBank National Association hereby makes its Motion for Partial Summary Judgment Against PAL I, LLC pursuant to Rule 56 of the Idaho Rules of Civil Procedure and supported by the Memorandum in Support of Motion for Partial Summary Judgment, the Affidavit of Jeff Hart and the Affidavit of Amber N. Dina in Support of Plaintiff's Motion for

Partial Summary Judgment filed concurrently herewith, and upon the record in this case and argument to be made by counsel.

DATED this 4th day of October, 2010.

GIVENS PURSLEY, LLP



Amber N. Dina

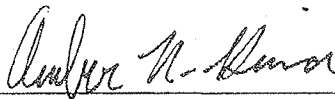
Attorneys for KeyBank National Association

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of October, 2010, a true and correct copy of the foregoing was served on the following by the manner indicated:

Bryan D. Smith
B.J. Driscoll
SMITH DRISCOLL & ASSOCIATES, PLLC
414 Shoup Ave.
P.O. Box 50731
Idaho Falls, ID 83405

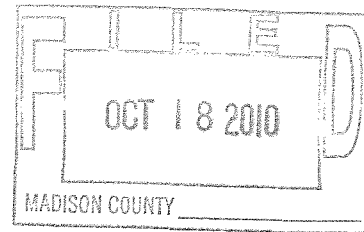
<input type="checkbox"/>	Via U.S. Mail
<input type="checkbox"/>	Via Hand-Delivery
<input type="checkbox"/>	Via Overnight Delivery
<input checked="" type="checkbox"/>	Via Facsimile 208-529-4166



Amber N. Dina

Bryan D. Smith, Esq. – ISBN 4411
B. J. Driscoll, Esq. – ISBN 7010
SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Ave.
P.O. Box 50731
Idaho Falls, Idaho 83405
Telephone: (208) 524-0731
Facsimile: (208) 529-4166

Attorneys for Defendant
PAL I, LLC



IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION, a
national banking association,

Plaintiff,

v.

PAL I, LLC, an Idaho limited liability
company; BRIAN CHRISTENSEN, an
individual; L.A. PARKINSON, an individual;
BARNEY DAIRY, INC.; D.J. BARNEY, an
individual; WILLIAM DAVIS, an individual;
LOIS DAVIS, an individual; DELL RAY
BARNEY, an individual; and DELL J.
BARNEY, an individual, dba Barney Towing
& Recovery,

Defendants.

Case No. CV-2010-680

**BRIEF IN OPPOSITION TO
PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
AGAINST PAL I**

The defendant, PAL I, LLC ("PAL"), files this brief in opposition to the motion for partial summary judgment filed by the plaintiff, KeyBank National Association ("KeyBank"),¹ against PAL. The court will note that PAL has filed its own motion for summary judgment, which is set for hearing at the same time as KeyBank's motion.

¹ In PAL's motion for summary judgment, it mistakenly referred to itself as plaintiff and KeyBank as defendant. PAL asks the court to disregard this error.

Because both motions involve the same basic issues, PAL opposes KeyBank's motion for all the reasons set forth in PAL's brief in support of its motion for summary judgment, which is incorporated herein by this reference.

PAL opposes KeyBank's motion for other reasons. Essentially, KeyBank admits that it failed to file a claim of exemption pursuant to Idaho Code Section 11-203,² but asks the court to treat Section 11-203 as "optional and not mandatory"³ despite the plain language of the statute. To support its argument, KeyBank relies on a California case applying a section of the California code that expressly states, "The interest of a third person in the property levied upon is not affected by the third person's failure to file a third-party claim under this chapter."⁴ Section 11-203 includes no similar provision for the preservation of third-party rights in levied property in Idaho. Thus, the California authority KeyBank relies on is inapposite in this case.

Further, in response to this purely legal issue, KeyBank argues that it would be "inequitable" for the court to interpret KeyBank's failure to comply with Section 11-203 as negating its priority interest in the property "simply" because KeyBank did not comply with the mandatory provisions of the code.⁵ However, "'Where a statute provides an adequate remedy of law, equitable remedies are generally not available.' ***It is well understood that equitable principles cannot supersede the positive enactments of the legislature.***" *Spencer v. Jameson*, 147 Idaho 497, 506 (2009) (quoting 27A AM.JUR.2D *Equity* § 213 (2008), and *Davis v. Dept. of Health & Welfare*, 130 Idaho 469, 471

² See pp. 4 and 6 of the Plaintiff's Memorandum In Support of Motion for Partial Summary Judgment Against PAL I dated October 4, 2010, already on file with the court.

³ See p. 5 of the Plaintiff's Memorandum In Support of Motion for Partial Summary Judgment Against PAL I dated October 4, 2010, already on file with the court.

⁴ See p. 4 of the Plaintiff's Memorandum In Support of Motion for Partial Summary Judgment Against PAL I dated October 4, 2010, already on file with the court.

⁵ See p. 4 of the Plaintiff's Memorandum In Support of Motion for Partial Summary Judgment Against PAL I dated October 4, 2010, already on file with the court.

(Ct.App. 1997)) (emphasis added). Also at play is the maxim that “[e]quity aids the diligent and not those who slumber on their rights.” *See, e.g., Callahan v. Giles*, 155 S.W.2d 793, 795 (1941); *see also Upton v. Tribilcock*, 91 U.S. 45, 55 (1875) (“Equity will not assist a man whose condition is attributable only to that want of diligence which may be fairly expected from a reasonable person”).

Here, Section 11-203 provides KeyBank a legal remedy to protect its security interest, namely by filing a claim of exemption as the statute requires. Equity cannot supersede the express provisions of Section 11-203. Although KeyBank feels the loss of its security interest in this case would be “inequitable,” the loss of its priority interest in the property is “attributable only” to it figuratively “slumbering on its rights” and failing to file the claim of exemption as required by the statute.


Finally, KeyBank argues that this court would “contradict settled law and public policy to strictly read Idaho Code § 11-203 as a mandatory provision”⁶ by ruling that KeyBank failed to comply with Section 11-203 and waived its priority interest in the property. However, KeyBank fails to explain how applying the plain language of Section 11-203 would “contradict settled law and public policy.” Rather, the court would be following settled law by applying the plain language of Section 11-203, and furthering the public policies of notice and due process by holding KeyBank accountable for its failure to comply with the statute. KeyBank’s failure to file the claim of exemption as required by Section 11-203 did alter its security interest as a matter of law.

For the reasons set forth herein and in PAL’s brief in support of its motion for summary judgment, the court should deny KeyBank’s motion and grant PAL’s motion.

⁶ See p. 5 of the Plaintiff’s Memorandum In Support of Motion for Partial Summary Judgment Against PAL, dated October 4, 2010, already on file with the court.

DATED this 15 day of October, 2010.

SMITH, DRISCOLL & ASSOCIATES, PLLC

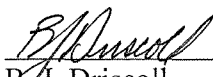

B. J. Driscoll, Esq.
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15 day of October, 2010, I caused a true and correct copy of the foregoing **BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST PAL I** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

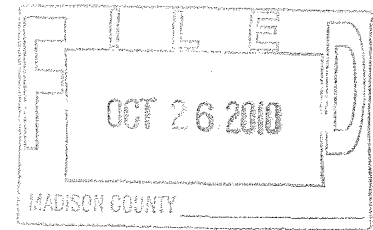
Thomas E. Dvorak, Esq.
Amber N. Dina, Esq.
GIVENS PURSLEY, LLP
601 West Bannock Street
Post Office Box 2720
Boise, Idaho 83701-2720
Facsimile: 208-388-1300

☒ U. S. Mail
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☐ Overnight Delivery
☐ Hand Delivery


B. J. Driscoll

Bryan D. Smith, Esq. – ISBN 4411
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SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Ave.
P.O. Box 50731
Idaho Falls, Idaho 83405
Telephone: (208) 524-0731
Facsimile: (208) 529-4166

Attorneys for Defendant
PAL I, LLC



IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION, a
national banking association,

Plaintiff,

v.

PAL I, LLC, an Idaho limited liability
company; BRIAN CHRISTENSEN, an
individual; L.A. PARKINSON, an individual;
BARNEY DAIRY, INC.; D.J. BARNEY, an
individual; WILLIAM DAVIS, an individual;
LOIS DAVIS, an individual; DELL RAY
BARNEY, an individual; and DELL J.
BARNEY, an individual, dba Barney Towing
& Recovery,

Defendants.

Case No. CV-2010-680

**REPLY BRIEF IN SUPPORT OF
PAL'S MOTION FOR SUMMARY
JUDGMENT AND MOTION TO
STRIKE**

The defendant, PAL I, LLC ("PAL"), files this brief in support of its motion for summary judgment against the plaintiff, KeyBank National Association ("KeyBank"), and its motion to strike the affidavit of Jeff Hart. To the extent the arguments and authorities cited herein are relevant to PAL's opposition to KeyBank's own motion for partial summary judgment, PAL submits this brief in opposition to KeyBank's motion.

I. THE COURT SHOULD GRANT SUMMARY JUDGMENT TO PAL BECAUSE KEYBANK DID NOT HAVE AN “UNWAIVABLE” INTEREST IN TRI-STEEL’S PROPERTY.

Without citation to any authority, KeyBank claims it had an interest in Tri-Steel’s property “that cannot be waived”¹ and that its admitted failure to comply with the mandatory provisions of Idaho Code Section 11-203 had no effect on the priority of its security interest. The court should reject KeyBank’s arguments for several reasons. The authorities are clear that KeyBank can waive its security interest. The Supreme Court of the United States is often cited for the rule that “[a] party may waive any provision, either of a contract or of a statute, intended for his benefit.” *Shutte v. Thompson*, 82 U.S. 151, 159 (1872) (cited 35 times for this legal issue) (the Supreme Court applied the doctrine of waiver, despite acknowledging that the waiver objection in *Shutte* was merely “formal” and not “substantial” but were nonetheless “quite sufficient” to recognize the waiver and grant the objection). “The doctrine of waiver, from its nature, applies ordinarily to all rights or privileges to which a person is legally entitled, provided a private right or privilege is involved.” 28 AM.JUR.2D *Estoppel and Waiver* § 210 (2010). As to waiver by secured parties, it is well-established that “the rights of a creditor under a security agreement may be lost by waiver or estoppel.” 68A AM.JUR.2D *Secured Transactions* § 7 (2010).

If accepted, KeyBank’s argument would render the mandatory written filing requirements of Section 11-203 completely meaningless. Under KeyBank’s interpretation, the Idaho Legislature spelled out a detailed procedure requiring judgment debtors and other third parties—specifically including secured parties—to perform

¹ See p. 5 of Plaintiff’s Opposition to PAL I. LLC’s Motion for Summary Judgment and Memorandum in already on file with the court.

affirmative acts such as filing written claims of exemption, within specific time periods, and the Legislature did all this for nothing. The court should reject this argument.

Finally, KeyBank suggests it would be “illogical” to hold that KeyBank waived its security interest while it sought to levy on the secured property based on its own judgment.² However, for the court to hold KeyBank waived its interest in the property by failing to comply with Section 11-203 is not “illogical” when the court considers the undisputed facts of this case. PAL served notice of the levy to KeyBank in both its Rexburg branch and Boise office. With the notices, PAL provided KeyBank with copies of the third-party claim of exemption forms and instructions for filing them with the Madison County Sheriff. Section 11-203 required KeyBank to file a written claim of exemption with the Madison County Sheriff within 14 days stating the basis for the claim and the amount of the claim. Thereafter, KeyBank failed or refused to file the written claim of exemption with the sheriff. Under the undisputed facts of this case, holding that KeyBank waived its claim to the property is not “illogical.”

II. THE COURT SHOULD STRIKE THE ORIGINAL AFFIDAVIT OF JEFF HART.

KeyBank asks the court to not strike the original affidavit of Jeff Hart filed in support of its motion for partial summary judgment because KeyBank filed a second, “corrected” affidavit from Mr. Hart.³ However, Idaho Rule of Civil Procedure 56(c) requires that the affidavits in support of a party’s motion for summary judgment “shall be served at least twenty eight (28) days before the time fixed for the hearing.” I.R.C.P.

56(c). Because KeyBank served the second affidavit on October 18, 2010, and KeyBank

² See p. 7 of Plaintiff’s Opposition to PAL I, LLC’s Motion for Summary Judgment and Memorandum in Opposition to Motion to Strike dated October 18, 2010, already on file with the court.

³ See p. 4 of Plaintiff’s Opposition to PAL I, LLC’s Motion for Summary Judgment and Memorandum in Opposition to Motion to Strike dated October 18, 2010, already on file with the court.

set its motion for hearing on November 1, 2010, the second affidavit is not timely and cannot be considered at the hearing on KeyBank's motion.

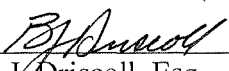
Moreover, considering Mr. Hart's original affidavit, KeyBank's failure to include the "magic words" of personal knowledge is not an insignificant oversight.⁴ For an affidavit to be considered at summary judgment, the affidavit "shall be made on personal knowledge" and "shall set forth such facts as would be admissible in evidence." I.R.C.P. 56(e). For facts to be admissible, they cannot be speculative. KeyBank downplays the deficiency of Mr. Hart's affidavit statement that he merely "believes" the content of KeyBank's complaint to be true, but the deficiency is fundamental. Courts should not be deciding summary judgment motions based on a particular witness' "belief" of the facts.

III. CONCLUSION.

For the reasons set forth herein and the related briefs, the court should grant PAL's motion for summary judgment and its motion to strike the affidavit of Jeff Hart.

DATED this 25 day of October, 2010.

SMITH, DRISCOLL & ASSOCIATES, PLLC



B. J. Driscoll, Esq.
Attorneys for Plaintiff

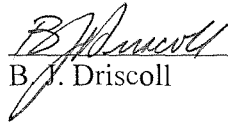
⁴ See p. 4 of Plaintiff's Opposition to PAL I, LLC's Motion for Summary Judgment and Memorandum in already on file with the court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25 day of October, 2010, I caused a true and correct copy of the foregoing **REPLY BRIEF IN SUPPORT OF PAL'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO STRIKE** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

Thomas E. Dvorak, Esq.
Amber N. Dina, Esq.
GIVENS PURSLEY, LLP
601 West Bannock Street
Post Office Box 2720
Boise, Idaho 83701-2720
Facsimile: 208-388-1300

☐ U. S. Mail
☒ Fax
☐ Overnight Delivery
☐ Hand Delivery


B. Driscoll

COURT MINUTES

CV-2010-0000680

Keybank National Association vs. PAL I, LLC, etal.

Hearing type: Summary Judgment

Hearing date: 11/1/2010

Time: 10:06 am

Judge: Gregory W Moeller

Courtroom: Brent J. Moss District Court

Court reporter:

Minutes Clerk: Angie Wood

Tape Number:

Party: Keybank National Association, Attorney: T Dvorak

Party: PAL I, LLC, Attorney: B.J. Driscoll

1006 J INTRO

PARTIES WAIVE COURT REPORTER

MR. DRISCOLL ARGUES MOTION TO STRIKE

PA RESPONDS

COURT WILL DENY MOTION TO STRIKE

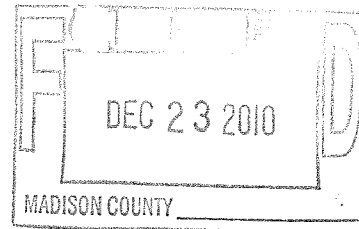
MR. DRISCOLL ARGUES MOTION FOR SUMMARY JUDGMENT

PA RESPONDS AND ARGUES MOTION FOR SUMMARY JUDGMENT

MR. DRISCOLL RESPONDS

PA RESPONDS

COURT WILL TAKE THE MATTER UNDER ADVISEMENT



IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR MADISON COUNTY

KEYBANK NATIONAL ASSOCIATION,)
a national banking association,)

Plaintiff,)

Case No. CV-10-680

v.)

MEMORANDUM DECISION

PAL I, LLC, an Idaho limited liability)
Company; BRIAN CHRISTENSEN, an)
individual L.A. PARKINSON, an individual;)
BARNEY DAIRY, INC.; D.J. BARNEY, an)
individual; WILLIAM DAVIS, an individual;)
LOIS DAVIS, an individual; DELL RAY)
BARNEY, an individual, and DELL J.)
BARNEY, an individual, dba Barney Towing)
& Recovery,)

Defendants.)
_____)

This matter comes before the Court on two competing motions for summary judgment filed one day apart: Defendant PAL I, LLC's ("PAL") motion for summary judgment filed October 4, 2010 and Plaintiff Keybank National Association's ("KeyBank") motion for partial summary judgment filed October 5, 2010. Both parties submitted supporting affidavits and responsive briefs. PAL also filed a motion to strike the Affidavit of Jeff Hart. Following oral argument on November 1, 2010, the Court denied the motion to strike and took the remaining issues matter under advisement.

I. UNDISPUTED FACTS

1. On April 16, 2007, KeyBank loaned \$150,000 to Tri-Steel Construction, Co., Inc. ("Tri-Steel"). KeyBank later made a subsequent loan to Tri-Steel for \$150,000 on December 5, 2008. Both loans were accompanied by signed security agreements specifying the collateral as all "inventory, equipment...attachments, accessories, tools,

parts, supplies...[etc].”¹ For each loan, KeyBank filed timely UCC1 Financing Statements with the Idaho Secretary of State.² KeyBank later filed suit against Tri-Steel (Madison County Case No. CV-2010-0000191).

2. PAL also sued Tri-Steel (Bonneville County Case No. CV-09-5734). On April 2, 2010, PAL recovered a judgment against Tri-Steel in the amount of \$20,224.00.³

3. On April 5, 2010, PAL obtained a Writ of Execution against property owned by Tri-Steel which specifically listed catwalks/scaffolding, forklifts, screw guns, electrical cords, office desks/chairs, and computers.⁴ A sheriff’s sale was scheduled for June 9, 2010.⁵

4. On April 26, 2010, the Madison County Sheriff’s Office mailed a third-party claim of exemption form and copies of the execution documents to KeyBank. KeyBank did not return the form.⁶ However, on April 28, 2010, KeyBank mailed a written objection to the levy/execution and informed PAL that the attached property was KeyBank’s secured collateral.⁷

5. KeyBank’s lawsuit against Tri-Steel was reduced to a default judgment on June 1, 2010, in the amount of \$296,500.74 plus interest and attorney’s fees.⁸

6. On or about June 4, 2010, KeyBank sent the Madison County Sheriff’s Office a writ of execution for the KeyBank Collateral and instructed the Sheriff to seize the KeyBank Collateral.⁹

7. KeyBank continued to assert its claim to the collateral levied upon by PAL. KeyBank sent letters to Pal and the Madison County Sheriff’s Office asking to postpone

¹ Exhibits A and C to Plaintiff’s Complaint, (August 16, 2010).

² *Id.*, Exhibits B and D.

³ Aff. of B.J. Driscoll in support of Defendant’s Motion for Summary Judgment (October 4, 2010).

⁴ Defendant’s Motion for Summary Judgment, Exhibit B.

⁵ Exhibit E to Plaintiff’s Complaint, “Letter to Bryan D. Smith from Thomas E. Dvorak” (April 28, 2010).

⁶ Aff. of Suzanne Bagley (October 1, 2010).

⁷ Aff. of Amber N. Dina in Support of Plaintiff’s Motion for Partial Summary Judgment against PAL I (October 4, 2010). *See also*: Exhibit E and G to Plaintiff’s Complaint.

⁸ Exhibit F to Plaintiff’s Complaint.

⁹ Plaintiff’s Complaint (August 12, 2010) (verified by the sworn affidavit of Jeff Hart on October 4, 2010).

the sheriff's sale scheduled by PAL for June 9, 2010 until the issues regarding priority of the competing claims could be resolved.¹⁰

8. Despite KeyBank's objections, the sheriff's sale was not postponed. The disputed personal property sold for \$16,884.41.¹¹

9. The priority of KeyBank's security interest over PAL judgment is not disputed between the parties.

10. PAL never tendered the amount claimed due to KeyBank pursuant to their security agreement with Tri-Steel.¹²

II. DISCUSSION

This case involves a junior lienholder (PAL) which levied and executed upon the secured collateral of a senior lienholder (KeyBank) without first obtaining consent or paying off the delinquent amount due to the senior/secured party. PAL does not contest the fact that KeyBank retained a perfected security interest with superior priority to their own judgment against Tri-Steel. Therefore, the issue in this case is whether non-compliance with Idaho's claim of exemption statute (I.C. §11-203) can nullify the priority of a perfected security interest over a subsequent judgment interest.

A. I.C. § 11-203 is not intended to affect a secured creditor's perfected interest.

PAL argues that any priority KeyBank possessed was waived by its failure to file for an exemption under I.C. § 11-203. At first glance, PAL's reliance on the 11-203 statute appears reasonable because the statute provides that its procedures:

"shall apply to claim[s]...by a third party that property levied upon is his property or that he has a security interest therein [and that a] third party claimant shall prepare a written claim setting forth the grounds upon which he claims the property and in the case of a secured party, also stating the dollar amount of the claim"

¹⁰ *Id.*, Exhibits G and H.

¹¹ *Id.*, Exhibit J.

¹² Plaintiff's Complaint, ¶26.

(Emphasis added). Because there is no Idaho case law directly on point, PAL cites an Iowa case to support their position that I.C. § 11-203 can alter priority of a perfected interest.¹³ However, unlike the scheme used in Iowa, Idaho law does not set forth the consequences for a perfected secured creditor that fails to file a third party claim.

Although I.C. § 11-203 lacks specific language to support PAL's argument, there is express language within I.C. § 28-9-315 which defeats PAL's contentions:

Except as otherwise provided in this chapter and in section 28-2-403(2): *A security interest or agricultural lien continues in collateral notwithstanding sale, lease, license, exchange or other disposition thereof unless the secured party authorized the disposition free of the security interest or agricultural lien.*

(Emphasis added). Therefore, the statute clearly implies that a perfected security interest survives the failure to comply with I.C. § 11-203 because the repercussions for failing to file an exemption are not provided for under I.C. §§ 11-203 or 28-2-403(2).

The claim of exemption statute is primarily intended to protect the rights of debtors—not to encumber the rights of a perfected and secured creditor. It would be illogical for a claim of exemption statute to provide a means for junior right holders to supplant the interests of perfected secured creditors with priority merely for failing to file a claim of exemption within the 14 day period. Instead, it is clear from the statutory scheme that I.C. § 11-203 was primarily intended to protect debtors and provide a means for secured parties to alert other creditors of their interests.

PAL argues that they were deprived “of the opportunity to determine whether to release the levy, pay off Tri-Steel’s debt to KeyBank, or to contest the amount or validity of KeyBank’s security interest.”¹⁴ However, this argument must fail because KeyBank had filed a UCC 1 providing notice of their secured interest against Tri-Steel.¹⁵ PAL was also advised of KeyBank’s pending lawsuit against Tri-Steel. Because this was all a matter of public record, PAL had access to all of the information necessary to make an

¹³ *Fiester v. Production Credit Assoc.*, 426 N.W.2d 676 (Iowa App. 1988) (affirming that a party’s failure to comply with the statutory obligation to “furnish a statement of the amount of indebtedness resulted in the loss of the secured party’s priority”).

¹⁴ Defendant’s Brief in Support of Motion for Summary Judgment, p. 6 (October 4, 2010).

¹⁵ Exhibits B and D to Plaintiff’s Complaint.

informed business decision regarding enforcement of their judgment. This is the same information PAL would have received if KeyBank had filed a claim of exemption pursuant to I.C. § 11-203.

The law regarding exemptions is clear that such laws are to be “liberally construed in favor of a debtor and the debtor's family” to “ameliorate the harsh common-law rule making all of the debtor’s property liable to execution for the payment of his debts.” *See*: 31 Am Jur 2d Exemptions §§ 17, 3 (2010). Furthermore, “[s]tatutory language should not be restricted in its meaning and effect so as to minimize its operation on the beneficent objects of the statutes.” *Id. See also: In re Williams*, 3 B.R. 244 (Bankr. E.D. Va. 1980); *Alsup v. Jordan*, 69 Tex. 300, 6 S.W. 831 (1887); *Stephenson v. Wixom*, 727 S.W.2d 747 (Tex. App. Fort Worth 1987). Because the exemption statute was primarily designed to protect or benefit debtors and third party creditors (like KeyBank), it would be improper to use such a statute to frustrate and ultimately thwart the very purpose for which it was enacted.

It is well-settled law that a “creditor holding a perfected security interest has priority over a subsequent execution on a judgment [and] when the collateral has been sold in execution on the judgment may recover the money paid.” 68A Am. Jur. 2d Secured Transactions § 837. The law is also clear that “[o]nly property owned by the judgment debtor is subject to execution to satisfy a judgment . . . The levy reaches only the interest of the debtor in the property and a judgment creditor can acquire no greater right in the property levied upon than that which the judgment debtor possesses.” 30 Am. Jur. 2d Executions, Etc. § 120. This is not a novel rule of law. A perfected security interest, similar to any vested right, “is one that so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent.” *In re K.A.P.*, 916 A.2d 1152, 1159 (Pa.Super., 2007). The notion of necessary consent is also consistent with the requirements of I.C. § 8-506A, which will be discuss further below.

For these reasons, the Court concludes as a matter of law that I.C. § 11-203 does not permit PAL to levy against KeyBank’s perfected security interest in the subject personal property. Because PAL could only attach an interest equal to Tri-Steel’s right to

the property at issue, its interest in the subject property is subordinate to KeyBank's perfected security interest.

B. The Execution Sale Should be Set Aside because PAL did not Comply with I.C. § 8-506A.

The Idaho Supreme Court has held that there can be no levy (or subsequent execution) under a writ of attachment unless the acts required by statute are substantially performed. *Long v. Burley State Bank*, 30 Idaho 392, 165 P. 1119 (1917). More recently, the Idaho Supreme Court also followed this rule in the case of *Fulton v. Duro*, 107 Idaho 240, 687 P.2d 1367 (Ct. App. 1984). In *Fulton*, a creditor levied and executed upon some of the debtor's real estate in satisfaction of a judgment. However, the writ of execution was not recorded (as required by statute) which rendered the sheriff's levy on the real property invalid, enabling the sale to be set aside.¹⁶ The Supreme Court ruled that I.C. § 8-506 provided a mandatory procedure for levying on real property pursuant to a writ of execution and that because the sheriff did not comply with the statutory procedure, the district court was correct in setting aside the sale. *Id.*

Just as the provisions of I.C. § 8-506 regarding writs of attachment for real estate are mandatory, so are the similar provisions of I.C. § 8-506A regarding attachment of personal property subject to a security agreement. I.C. § 8-506A states:

[P]roperty that is subject to a security interest...may be attached by the following methods, and no other:

(a) Personal property capable of manual delivery may be attached by taking possession, *provided all secured parties with a perfected security interest therein under the Idaho uniform commercial code consent thereto in writing*, and the attachment shall be subject to the rights of any secured party under a perfected security agreement, but otherwise would be to the same effect and in the same manner as if the property were not subject to the security agreement.

(b) If any secured party with a perfected security interest does not consent in writing that the sheriff take possession of the personal property, *the attaching*

¹⁶ The Court also noted that the term "levy" is not defined in Title 11 of the Idaho Code, but that the Legislature intended that levying under a writ of attachment should be similar to levying under a writ of execution. The ultimate justification for setting aside the sale was based on the Idaho Supreme Court decision in *Long v. Burley State Bank*, 30 Idaho 392, 165 P. 1119 (1917), holding that "there is no levy under a writ of attachment unless the acts required by statute are substantially performed."

creditor must pay or tender to the secured party the amount due on the security agreement before the officer may take the property into possession..."

(Emphasis added). It is undisputed that KeyBank never consented in writing to PAL's actions. In fact, they specifically objected orally and in writing on multiple occasions.

Idaho Code § 8-506A is also consistent with the law set forth in I.C. § 28-9-315(1), which states:

[E]xcept as otherwise provided in this chapter and in section 28-2-403(2):

A security interest or agricultural lien continues in collateral notwithstanding sale, lease, license, exchange or other disposition thereof *unless the secured party authorized the disposition free of the security interest* or agricultural lien; . . .

(Emphasis added). The drafter's "Official Comment No. 2" to I.C. 28-9-315 gives further guidance regarding the interpretation of this statute:

Subsection (a)(1)...contains the general rule that a security interest survives disposition of collateral. In these cases, the secured party may repossess the collateral from the transferee or, in an appropriate case, maintain an action for conversion. The secured party may claim for both any proceeds and the original collateral but, of course, may have only one satisfaction.

It is also worth noting that I.C. §28-9-109 states that "this chapter applies to: A transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract; . . ." The personal property at issue in this case consisted of catwalks/scaffolding, forklifts, screw guns, electrical cords, office desks/chairs, and computers. Such items being "personal property," they are subject to the provisions of UCC Chapter 9.

The Court recognizes that PAL contends the language in I.C. §11-203 is also mandatory and should have been complied with by KeyBank. However, before PAL can insist on such a result, it was incumbent upon them to first comply with I.C. § 8-506A and obtain authorization from KeyBank. When read together, the Court is persuaded that while the requirements of I.C. § 8-506A were intended to be mandatory upon levying creditors, the requirements of I.C. §11-203 are not strictly enforceable against holders of a perfected secured interest with priority. To hold otherwise would render I.C. § 8-506A meaningless. While PAL may argue that this ruling now renders portions of I.C. §11-203

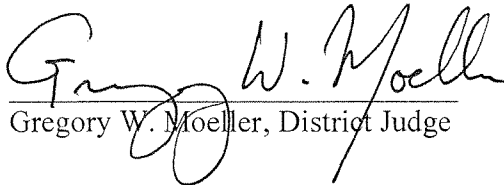
meaningless, the Court respectfully disagrees. Unlike I.C. § 8-506A, I.C. §11-203 was not intended to set forth the rights of creditors.

Inasmuch as PAL did not comply with the procedure as set forth under I.C. § 8-506A, the levy, execution, and sale are void as to KeyBank's interests. Upon reviewing the pleadings, briefs, motions, and affidavits submitted, the Court is satisfied that KeyBank did not consent in writing to PAL's attachment of KeyBank's collateral. In fact, Exhibit G to KeyBank's complaint verifies that KeyBank's attorneys specifically challenged the execution sale and asserted KeyBank's rights as a secured creditor. Because PAL never tendered payment to KeyBank in the amount due under their security agreement with Tri-Steel, KeyBank is entitled to those proceeds as a matter of law.

III. CONCLUSION

For the reasons set forth above, Plaintiff's Motion for Partial Summary Judgment is GRANTED and Defendant's Motion for Summary Judgment is hereby DENIED.

Dated this 22nd day of December, 2010.

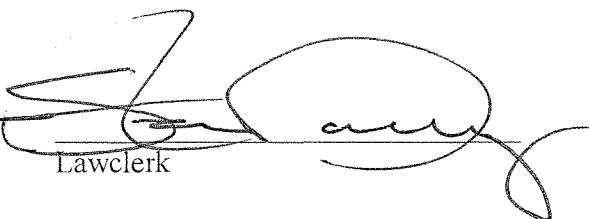

Gregory W. Moeller, District Judge

CERTIFICATE OF SERVICE

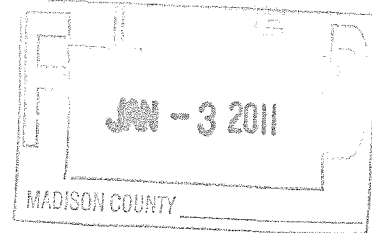
I hereby certify that a true and correct copy of the foregoing Memorandum Decision was this 23rd day of December, 2010, served upon the following individuals via U.S. Mail, postage prepaid:

SMITH, DRISCOLL, & ASSOC., PLLC
414 Shoup Ave.
P.O. Box 50731
Idaho Falls, Idaho 83405

GIVENS PURSLEY, LLP
601 West Bannock St.
P.O. Box 2720
Boise, Idaho 83701

By 
Lawclerk

Thomas E. Dvorak (ID State Bar ID# 5043)
Amber N. Dina (ID State Bar ID# 7708)
GIVENS PURSLEY LLP
601 West Bannock Street
Post Office Box 2720
Boise, Idaho 83701-2720
Telephone: 208-388-1200
Facsimile: 208-388-1300
1047672_1 (10894-2)



Attorneys for KeyBank National Association

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT FOR THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION, a
national banking association,

Plaintiff,

v.

PAL I, LLC, an Idaho limited liability
company; BRIAN CHRISTENSEN, an
individual; L.A. PARKINSON, an individual;
BARNEY DAIRY, INC.; D.J. BARNEY, an
individual; WILLIAM DAVIS, an individual;
LOIS DAVIS, an individual; DELL RAY
BARNEY, an individual; and DELL J.
BARNEY, an individual, dba Barney Towing
& Recovery,

Defendants.

Case No. CV-10-680

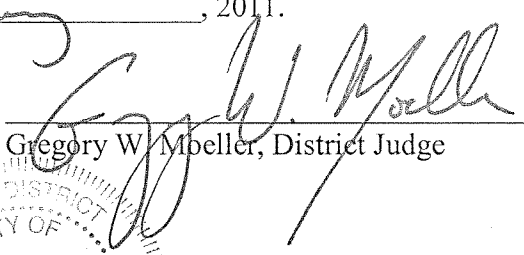
JUDGMENT

Based on the Memorandum Decision entered on December 22, 2010, and good cause
appear, IT IS HEREBY ORDERED ADJUDGED AND DECREED:

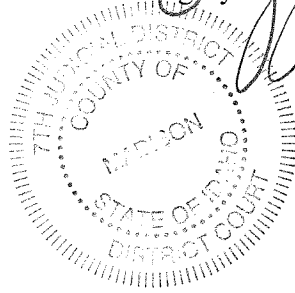
1. that Judgment is HEREBY granted in favor of KeyBank National Association
("KeyBank") and against Defendant PAL I, LLC, on Count 1 of the Complaint filed in this
matter;

2. that Defendant PAL I, LLC is liable to KeyBank for the proceeds of the Sheriff's sale in the amount of \$16,884.41, plus interest on said amount from and after the date of entry of this Judgment at the statutory judgment rate of 5.375% per annum.

DATED this 3rd day of January, 2011.



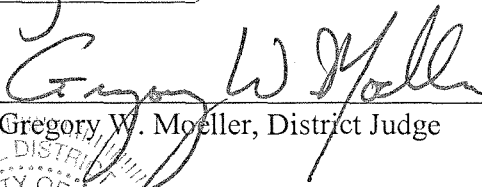
Gregory W. Mbeller, District Judge



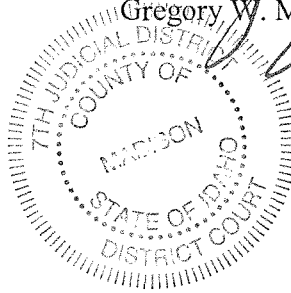
RULE 54(b) CERTIFICATE

With respect to the issues determined by the above Judgment, it is hereby CERTIFIED, in accordance with Rule 54(b) of the Idaho Rules of Civil Procedure, that the Court has determined that there is no just reason for delay of the entry of judgment as to the claims filed against the Defendant Pal I, LLC and that the Court has and does hereby direct the above Judgment shall be a final judgment upon which an appeal be taken as provide by the Idaho Appellate Rules.

DATED this 3rd day of January, 2011.



Gregory W. Moeller, District Judge



CLERK'S CERTIFICATE OF MAILING

I hereby certify that on the 3 day of January, 2011, I mailed
(served) a true and correct copy of the within instrument to:

Thomas E. Dvorak
Amber N. Dina
GIVENS PURSLEY LLP
601 West Bannock Street
Post Office Box 2720
Boise, Idaho 83701-2720
Facsimile: 208-388-1300

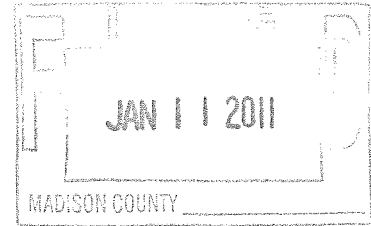
Bryan D. Smith
B.J. Driscoll
SMITH DRISCOLL & ASSOCIATES, PLLC
414 Shoup Ave.
P.O. Box 50731
Idaho Falls, ID 83405
Facsimile: 208-529-4166

CLERK OF THE DISTRICT COURT

By: 

Deputy Clerk

Bryan D. Smith, Esq. – ISBN 4411
B. J. Driscoll, Esq. – ISBN 7010
SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Ave.
P.O. Box 50731
Idaho Falls, Idaho 83405
Telephone: (208) 524-0731
Facsimile: (208) 529-4166



Attorneys for Defendant
PAL I, LLC

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION, a
national banking association,

Plaintiff,

v.

PAL I, LLC, an Idaho limited liability company;
BRIAN CHRISTENSEN, an individual; L.A.
PARKINSON, an individual; BARNEY DAIRY,
INC.; D.J. BARNEY, an individual; WILLIAM
DAVIS, an individual; LOIS DAVIS, an
individual; DELL RAY BARNEY, an individual;
and DELL J. BARNEY, an individual, dba
Barney Towing & Recovery,

Defendants.

Case No. CV-2010-680

MOTION FOR RECONSIDERATION

COMES NOW the defendant, PAL I, LLC (hereinafter "PAL"), by and through its counsel of record, and pursuant to Idaho Rule of Civil Procedure 11(a)(2) respectfully moves the Court for reconsideration of its Memorandum Decision filed December 23, 2010. Specifically, PAL seeks an order granting PAL's motion for reconsideration, vacating the Judgment filed January 3, 2011, entering an order vacating the Memorandum Decision, granting PAL's prior motion for summary judgment, and

denying KeyBank National Association's ("KeyBank") prior motion for partial summary judgment

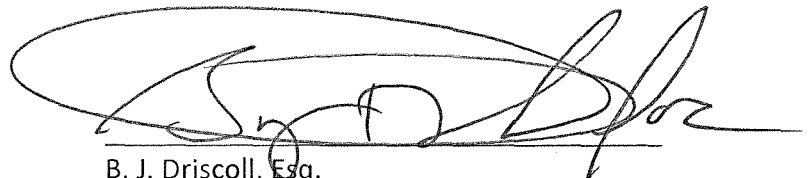
This motion is made on the grounds and for the reasons set forth in the supporting brief filed herewith.

This motion is based on this Motion, the Brief in Support of Motion for Reconsideration, the Notice of Hearing, and the court's records and files herein.

Defendant requests oral argument on said motion.

DATED this 10th day of January, 2011.

SMITH, DRISCOLL & ASSOCIATES, PLLC



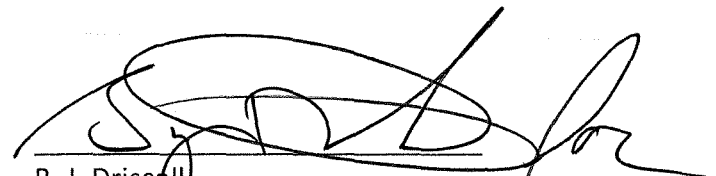
B. J. Driscoll, Esq.
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of January, 2011, I caused a true and correct copy of the foregoing **MOTION FOR RECONSIDERATION** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

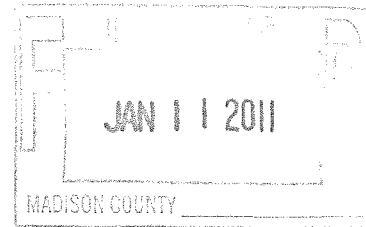
Thomas E. Dvorak, Esq.
Amber N. Dina, Esq.
GIVENS PURSLEY, LLP
601 West Bannock Street
Post Office Box 2720
Boise, Idaho 83701-2720
Facsimile: 208-388-1300

☒ U. S. Mail
☐ Fax
☐ Overnight Delivery
☐ Hand Delivery



B. J. Driscoll

Bryan D. Smith, Esq. – ISBN 4411
B. J. Driscoll, Esq. – ISBN 7010
SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Ave.
P.O. Box 50731
Idaho Falls, Idaho 83405
Telephone: (208) 524-0731
Facsimile: (208) 529-4166



Attorneys for Defendant
PAL I, LLC

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION, a
national banking association,

Plaintiff,

v.

PAL I, LLC, an Idaho limited liability company;
BRIAN CHRISTENSEN, an individual; L.A.
PARKINSON, an individual; BARNEY DAIRY,
INC.; D.J. BARNEY, an individual; WILLIAM
DAVIS, an individual; LOIS DAVIS, an
individual; DELL RAY BARNEY, an individual;
and DELL J. BARNEY, an individual, dba
Barney Towing & Recovery,

Defendants.

Case No. CV-2010-680

**BRIEF IN SUPPORT OF MOTION FOR
RECONSIDERATION**

I. INTRODUCTION.

The defendant, PAL I, LLC ("PAL"), files this brief in support of its motion for reconsideration of this court's Memorandum Decision filed December 23, 2010. In its Memorandum Decision, the court held that KeyBank National Association ("KeyBank") retained a first position security interest in property sold at a sheriff's sale despite KeyBank's admitted failure to comply with the mandatory requirements of Idaho Code

Section 11-203. In support of its decision, the court stated Section 11-203 does not explicitly state the consequences of a secured party's failure to comply, whereas Section 28-9-315 "clearly implies" that the security party's interest in collateral is unaffected by a sheriff's sale.¹ Further, the court held that the sheriff's sale should be set aside because PAL failed to comply with Idaho Code Section 8-506A.²

Because the court's reasoning and conclusion are contrary to established law and rules of statutory construction as explained more fully below, the court should grant PAL's motion for reconsideration, vacate the Judgment filed January 3, 2011, enter an order vacating the Memorandum Decision, grant PAL's prior motion for summary judgment, and deny KeyBank's prior motion for partial summary judgment.

II. THE DISTRICT COURT ERRED BY FAILING TO FOLLOW ESTABLISHED RULES OF STATUTORY CONSTRUCTION AND APPLY THE SPECIFIC LANGUAGE OF SECTION 11-203.

To preface its arguments, PAL sets forth the relevant provisions of Idaho Code Section 11-203 as follows:

The following procedures ***shall apply*** to a claim by the defendant or the defendant's representative that property levied upon is exempt and to ***any claim*** by a ***third party*** that property levied upon is his property or that ***he has a security interest therein***. The defendant or the defendant's representative shall complete the claim of exemption form as provided in section 8-507C, Idaho Code. ***A third party claimant shall prepare a written claim*** setting forth the grounds upon which he claims the property, ***and in the case of a secured party, also stating the dollar amount of the claim***. A claim of exemption or third party claim may be filed only if property has been levied upon.

(a) The claim of exemption or third party claim ***shall*** be delivered or mailed to the sheriff within fourteen (14) days after the date the sheriff hand delivers or mails the documents required to be served upon

¹ See pp. 3-5 of Memorandum Decision.

the defendant and third parties under section 8-507A, Idaho Code. If the claim is mailed, it *must* be received by the sheriff within the fourteen (14) day period. In computing the fourteen (14) day period, intervening weekends and legal holidays shall be counted, but if the last day of the period falls on a weekend or legal holiday, the period shall be deemed to run until the close of business of the first business day following the weekend or holiday.

....

(c) The sheriff shall not deliver to the plaintiff or sell the property levied upon, except if perishable as provided by law, until the period for filing a claim has elapsed. *The sheriff shall refuse to accept or honor a claim not filed with him within that period and unless otherwise ordered by the court, shall, after such period has elapsed, proceed to sell or deliver the property levied upon to the plaintiff or other person in whose favor the execution runs.*

....

(Emphasis added.)

- A. The Memorandum Decision Erroneously Applies The General Statute Over The Specific Statute, Ignores The Plain Language Of Section 11-203, And Renders Section 11-203 A Nullity.

In its Memorandum Decision, the court concluded that KeyBank retained its security interest in the property despite its admitted failure to comply with Section 11-203 by relying on Section 28-9-315 that “[a] security interest . . . continues in collateral notwithstanding sale.” In doing so, the court violated two rules of statutory construction by applying the general statute of Section 28-9-315 in a way that renders the specific statute in Section 11-203 a nullity.

Idaho appellate courts have long recognized that “a specific statute will control over a general or vague statute when the two are in conflict.” *Mickelsen v. City of Rexburg*, 101 Idaho 305, 307 (1980) (citing *Christensen v. West*, 92 Idaho 87 (1968)).

The Idaho Supreme Court states a corollary rule of statutory construction that “it is incumbent upon this Court to give a statute an interpretation that will not in effect

nullify it . . . and it is not to be presumed that the legislature performed an idle act of enacting a superfluous statute.” *Walker v. Nationwide Financial Corp. of Idaho*, 102 Idaho 266, 268 (1981) (multiple citations omitted).

A simple review of Section 11-203 illustrates how this section is far more specific than Section 28-9-315. Section 11-203 states that the procedures set forth therein “shall apply . . . to *any claim* by a *third party* that property levied upon is his property or *that he has a security interest* therein. . . . A third party claimant shall prepare a written claim setting forth the grounds upon which he claims the property, *and in the case of a secured party, also stating the dollar amount of the claim.*” This claim “shall be delivered or mailed to the sheriff within fourteen (14) days.” I.C. § 11-203(a). KeyBank was a third party to the action between PAL and Tri-Steel. KeyBank claimed that it had a security interest in the levied property, which certainly falls within the statute’s application to “any” claim. Section 11-203 could not be more in point with the present case.

On the other hand, Section 28-9-315 is a section from Idaho’s Uniform Commercial Code dealing with secured transactions that states the general rule that a sale does not typically affect a security interest in the collateral. Section 28-9-315 does not discuss enforcement of judgments in civil actions, levy by execution, claims of exemptions, or sheriff’s sale. As such, Section 11-203 is far more specific—and therefore more applicable—than Section 28-9-315.

Disregarding the specific and mandatory language found in Section 11-203, the court held that KeyBank’s security interest survived the sheriff’s sale despite KeyBank’s

admitted failure to comply with Section 11-203. In doing so, the court rendered Section 11-203 completely meaningless. In effect, the court's analysis "presume[s] that the legislature performed an idle act of enacting a superfluous statute" when the legislature crafted a detailed statutory procedure that expressly states that it "shall apply" to "any claim" by a third party secured creditor that it has a security interest in levied property, and by further requiring the secured party to state the grounds for and amount of its claim to the property. The court's analysis assumes the Section 11-203 is nothing but a legislative exercise in futility.

On the other hand, requiring KeyBank's compliance with Section 11-203 comports with the law that the specific statute applies over the general statute. Requiring KeyBank's compliance with Section 11-203 to maintain its security interest also gives meaning to Section 11-203, thereby complying with the rule of statutory construction.

The Memorandum Decision is particularly troubling because it fails to recognize that Section 11-203 spells out the penalty for a party's failure to file a claim of exemption. Section 11-203(c) provides specific instructions to the sheriff for the treatment of levied property if the procedures of the section are not satisfied. If a person does not timely file a claim of exemption, Section 11-203(c) requires the sheriff to "refuse to accept or honor" any such claim "and unless otherwise ordered by the court, ***shall, after such period has elapsed, proceed to sell or deliver the property levied upon to the plaintiff or other person in whose favor the execution runs.***" *Id.*

Although the court felt Section 11-203 “lacks specific language to support PAL’s argument,”³ Section 11-203 specifically directs the sheriff to reject any untimely claim to the property and then sell the levied property and deliver the proceeds to “the plaintiff or other person in whose favor the execution runs.” I.C. § 11-203(c). By refusing KeyBank’s requests to cancel the sale or deliver sale proceeds to KeyBank, and instead by proceeding with the sale and delivering the proceeds to PAL, the sheriff followed the express directions of Section 11-203 to “refuse to accept or honor” KeyBank’s untimely and improper requests. The sheriff did his statutory duty and delivered the sale proceeds to PAL.⁴ By acquiescing to KeyBank’s requests, the sheriff would have been in direct violation of Section 11-203. The Memorandum Decision reaches a result directly contrary to the express directive of Section 11-203.

Finally, “The word shall, when used in a statute, is mandatory.” *Goff v. H.J.H. Co.*, 95 Idaho 837, 839 (1974) (citations omitted). Section 11-203’s repeated use of the word “shall” demonstrates a clear legislative intent that the requirements of Section 11-203 are mandatory. By recognizing KeyBank’s priority despite its failure to comply with the mandatory language of Section 11-203, the Memorandum Decision ignores the language of Section 11-203 and treats “shall” as merely suggestive.

B. The Memorandum Decision Fails To Apply The More Recent Statute.

As the Idaho Supreme Court explains, “Statutes are construed under the assumption that the legislature was aware of all other statutes and legal precedence at the time the statute was passed.” *Druffel v. State, Dept. of Transp.*, 136 Idaho 853, 856

³ See p. 4 of Memorandum Decision.

⁴ –

(2002) (citations omitted). Moreover, if two statutes are in conflict, “the more recently enacted statute governs.” *State v. Gamino*, 148 Idaho 827, 829 (Ct.App. 2010) (citing *State v. Killinger*, 126 Idaho 737, 740 (1995); *Mickelsen v. City of Rexburg*, 101 Idaho 305, 307 (1980)).

The Idaho Legislature first enacted Section 11-203 in 1991,⁵ whereas Section 28-9-315 relied on by the court existed before Section 11-203.⁶ Under the court’s analysis, Section 28-9-315 and Section 11-203 are in conflict because Section 28-9-315 says that a security interest in collateral remains despite sale, whereas Section 11-203 requires a secured party to take specific, additional steps to prevent the sheriff from selling that property.

In light of this conflict, the court should have applied the “more recently enacted statute” found Section 11-203. *See Gamino, supra*. The law presumes that the Idaho Legislature knew of Section 28-9-315 (or 28-9-306(2) as formerly known), and nevertheless enacted Section 11-203 requiring secured creditors to take additional steps to assert “any claim” to a “security interest” in levied property, and directed the sheriff to sell the property and deliver the proceeds to “the plaintiff or other person in whose favor the execution runs.”

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⁵ See S.L. 1991, ch. 165, § 10, p. 395.

⁶ The Idaho Legislature enacted the current version of Section 28-9-315 in 2001. *See* S.L. 2001, ch. 208, § 1. However, Idaho’s Uniform Commercial Code contained a nearly identical provision previously codified as I.C. § 28-9-306(2). *See, e.g., Newgen v. OK Livestock Exchange*, 117 Idaho 445, 447 (Ct.App. 1990). The history of current Section 28-9-315 and the former 28-9-306(2) indicate this language existed in Idaho’s Uniform Commercial Code since 1967. *See* S.L. 1967, ch. 161.

C. KeyBank Can (And Did) Waive Its Rights In Collateral.

The Memorandum Decision suggests that a perfected secured creditor like KeyBank cannot waive its security interest in collateral. However, in *Western Idaho Production Credit Ass'n v. Simplot Feed Lots, Inc.*, 106 Idaho 260, 263 (1984), the Idaho Supreme Court held that a perfected secured creditor lost its rights in collateral following sale despite the secured creditor's objection that it had not completely authorized the sale of the collateral. The Court noted that other jurisdictions considering similar circumstances often hold that the secured party has waived its interest in the collateral "upon the theory that the secured party has waived its security interest." *Id.* at 264.

The result in *Western Idaho Production Credit* comports with the Section 28-1-103, which provides that "[u]nless displaced by the particular provisions of the uniform commercial code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions." Waiver is a recognized principle of law and equity and thus available to supplement the provisions of the UCC.

Other courts have applied waiver in UCC cases as one of "the principles of law and equity" that necessarily "supplement" the UCC's provisions. In *Clovis Nat'l Bank v. Thomas*, 425 P.2d 726, 732 (N.M. 1967), the court explained as follows:

Also, under the code the secured party may consent to the sale of the collateral, and thereby waive his rights in the same. See Official Comment No. 3, s 9-306, and Official Comment No. 2, s 9-307. ***There being no particular provision of the code which displaces the law of***

waiver, and particularly waiver by implied acquiescence or consent, the code provisions are supplemented thereby. Section 50A-1-103, N.M.S.A.1953.

(Emphasis added.) Although *Clovis* predates more recent amendments to Article 9 of the UCC, nothing in the current Article 9 conflicts with *Clovis* or *Western Idaho Production Credit* or prevents a secured creditor from waiving its rights in collateral.

Importantly, *Western Idaho Production Credit* predates the enactment of Section 11-203 in 1991. This means that the Court found that WIPCA lost its rights in the collateral without WIPCA's violation of a specific statute like Section 11-203. Here, holding that KeyBank waived its right in the collateral is even more correct because KeyBank failed to comply with the specific requirements of a statute requiring a claim of exemption be filed with the sheriff to preserve "*any claim by a third party* that property levied upon is his property or *that he has a security interest* therein." I.C. § 11-203 (emphasis added).

III. THE DISTRICT COURT ERRED IN SETTING ASIDE THE SHERIFF'S SALE BY REQUIRING PAL'S COMPLIANCE WITH IDAHO CODE SECTION 8-506A.

The court erred in setting aside the sheriff's sale for the reason that PAL did not comply with Idaho Code Section 8-506A. In fact, Section 8-506A does not apply at all.

A. Numerous Sections Of The Idaho Code Regarding Enforcement Of Judgments In Civil Actions Specifically Require Compliance With Section 8-507, Et Seq., And Not Section 8-506A.

Idaho Code Section 11-301 specifically states, "The provisions of **sections 8-507 through 8-507D [not 8-506A]**, Idaho Code, **shall** apply to a levy upon personal property." I.C. § 11-301 (emphasis and brackets added). Section 8-527 specifically requires that "[i]f any personal property attached, garnished or executed upon be

claimed by a third person as his property . . . *the same rules shall prevail as to the contents and making of said claim*, and as to the holding of said property, *as in the case of a claim after levy upon execution, as provided in section 11-203*, Idaho Code.” I.C. § 8-527 (emphasis added). Further, Section 11-203 refers to the use of the specific form “provided in section 8-507C” and Section 11-203(a) refers to the documents required to be served upon the defendant and third parties “under section 8-507A.” I.C. § 11-203.

Coming full circle, Section 8-507(c) reiterates that “[t]he provisions of *this section and sections 8-507A through 8-507D [not 8-506A]*, Idaho Code, *shall* apply to any levy by execution pursuant to *chapters 2 and 3, title 11, Idaho Code*.” I.C. § 8-507(c) (emphasis and brackets added).

Clearly, the court erred when it set aside the sheriff’s sale based on PAL’s failure to comply with Section 8-506A when the law required no such compliance and other statutes expressly require compliance with Section 8-507, et seq.

B. The *Fulton* Case Provides No Basis For Requiring PAL’s Compliance With Section 8-506A.

KeyBank and the court relied on *Fulton v. Duro*, 107 Idaho 240 (Ct.App. 1984), to suggest PAL had to comply with Section 8-506A. However, *Fulton* does not provide any support for the court’s extension. First, *Fulton* involves an execution against real property, not personal property, which invokes different rules and procedures. See I.C. § 11-102 (distinguishing between personal property and real property subject to execution); I.C. § 11-301 (providing different procedure for levy on personal property); I.C. § 11-302 (providing different notice requirements for sale of personal property and real property); I.C. § 11-304 (providing different procedures for conducting the sale of

personal property and real property); I.C. § 11-310 (providing a right of redemption to real property only); Chapter 4, Title 11, Idaho Code (entire chapter devoted to redemption rights in real property).

Second, *Fulton* predates enactment of Section 11-203 in 1991.⁷ Thus, the court of appeals had no opportunity to consider Section 11-203. Instead, the court extrapolated from Section 11-201 to extend the requirements of Section 8-506 to a levy on real property by writ of execution. *Id.* at 246. Again, “Statutes are construed under the assumption that the legislature was aware of all other statutes and legal precedence at the time the statute was passed.” *Druffel v. State, Dept. of Transp.*, 136 Idaho 853, 856 (2002) (citations omitted). The court erred by relying on inapposite precedent predating Section 11-203.

C. Section 11-203 Is Expressly Mandatory Whereas Section 8-506A Is Expressly Permissive.

As explained above, Section 11-203 repeatedly uses the terms “shall” and “must” in describing the procedures for a person to claim an exemption in levied property. To the contrary, Section 8-506A repeatedly employs the permissive term “may” to describe how property “may” be attached. See I.C. § 8-506A (property “may be attached by the following methods”); I.C. § 8-506A(a) (property “may be attached by taking possession”). Further, Section 11-201, which is the section that describes property subject to execution, also uses the permissive “may” instead of the mandatory “must” when reciting that property “may” be attached on execution in like manner as upon writs of attachment. Despite the obvious distinction between the mandatory language

of Section 11-203 and the permissive language of Section 8-506A, the Memorandum Decision erroneously holds that Section 8-506A is “mandatory” in relation to execution on personal property subject to a security agreement.⁸

D. The Procedures In Section 8-501 Through Section 8-506A Refer Only To Pre-Judgment Writs Of Attachment, Not Post-Judgment Writs Of Execution.

Idaho Code Section 8-501 through Section 8-506D introduce the procedure for a plaintiff “to have the property of the defendant attached . . . as security for the satisfaction of *any judgment that may be recovered* . . .,” (emphasis added), in limited cases. I.C. § 8-501. These sections address *pre-judgment* writs of attachment. Before issuing a pre-judgment writ, the court “examine[s] the complaint and affidavit.” I.C. § 8-502(b); *see also* I.C. § 8-502(c). The court “shall make a preliminary determination of whether there is a reasonable probability that the plaintiff will prevail in its claim.” I.C. § 8-502(e). The form of the pre-judgment writ directs the sheriff to attach sufficient property to cover the amount of damages stated in plaintiff’s complaint. I.C. § 8-504. Section 8-506 provides the methods for serving the pre-judgment writ on various types of property. Section 8-506A describes the procedure for a pre-judgment writ exercised against a debtor’s interest in personal property subject to a security agreement. Section 8-506C permits a defendant to file an undertaking with the court “sufficient to satisfy the plaintiff’s claims.” Section 8-506D addresses the sufficiency of the sureties of the debtor’s undertaking. Read together, Sections 8-501 through Section 8-506D refer exclusively to *pre-judgment* writs of attachment.

On the other hand, Title 11 of the Idaho Code, including Section 11-203, refers to *post-judgment* writs of execution and the procedures to enforce judgments in civil actions. Section 11-101 states that a writ of execution may be issued to “the party in whose favor the judgment is given” to aid in enforcement of that judgment. Section 11-102 requires that the *post-judgment* writ “intelligently refer to the judgment.” Section 11-104 provides that “[w]hen the judgment is for money . . . the same may be enforced by a writ of execution.” Section 11-201 identifies all the property “liable to execution,” including all “goods, chattels, moneys and other property, both real and personal, or any interest therein of the judgment debtor.” Recognizing the distinction between general property and property attached pursuant to a pre-judgment writ, Section 11-201 separately identifies property “seized and held under attachment in the action.”

A review of the statutory context of both statutes illustrates that Section 8-506A applies to *pre-judgment* writs of attachment while Section 11-203 applies to *post-judgment* writs of execution. The court erred in requiring PAL to comply with the *pre-judgment* procedures of 8-506A rather than the more specific, recent, and applicable *post-judgment* procedures of 11-203.

IV. THE MEMORANDUM DECISION INTERPRETS SECTION 11-203 IN A WAY THAT VIOLATES PAL’S RIGHTS TO EQUAL PROTECTION BY GIVING SECURED CREDITORS GREATER RIGHTS THAN OWNERS OF COLLATERAL TO THE DETRIMENT OF JUDGMENT CREDITOR’S LIKE PAL.

The Idaho Supreme Court has repeatedly held, “In reviewing the constitutionality of a statute, Idaho appellate courts are obligated to ‘seek an interpretation of a statute that upholds its constitutionality.’ When the court finds that a statute is capable of two interpretations, one which would make it constitutional and the other unconstitutional,

the court should adopt that construction which upholds the validity of the act.” *State v. Hellickson*, 135 Idaho 742 (2001) (quotation and citations omitted).

Here, the court has improperly interpreted Section 11-203 in such a way that renders it unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Specifically, the court interpreted Section 11-203 in a manner that gives secured parties greater rights in levied property than the owner of the levied property by holding that KeyBank did not waive its security interest in the property despite its admitted failure to comply with Section 11-203.

The United States Supreme Court explains analysis of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States as follows:

In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’

Reed v. Reed, 404 U.S. 71, 75 (1971) (citations and quotation omitted).

The Idaho Supreme Court recently cited this language from *Reed* in *Credit Bureau of Eastern Idaho, Inc. v. Lecheminant*, 149 Idaho 467 (2010). In *Lecheminant*, the Idaho Supreme Court held the unequal treatment of persons under Idaho Code Section 11-204 was “arbitrary and does not demonstrate a substantial relation to the objective

of community property legislation” and therefore unconstitutional for violation of the Equal Protection Clause.

Certainly, a judgment debtor owning property can and does waive her ownership interest in levied property by failing to comply with Section 11-203. If an owner of property with notice of the levy can waive her interest in the property, then a secured party with notice should be held to waive its interest in the property as well. Despite this call for equal protection, the court interpreted Section 11-203 in such a way that violates PAL’s rights to equal protection by giving secured parties greater rights in levied property than the owner of the levied property.

The court’s interpretation treating secured creditors and owners differently is unconstitutional because it is “wholly unrelated to the objective” of Section 11-203, which is to provide a procedure for owners and secured parties with an opportunity to assert a claim to the property, for judgment creditors to contest those claims, and for speedy resolution of those claims by the sheriff or court. The court’s placement of secured parties in a better position than owners is arbitrary in that there is no justifiable reason that a secured party need not comply with the claim of exemption procedure to preserve its security interest while an owner must timely file the claim of exemption to preserve her interest. In light of the patent purpose of Section 11-203, the court’s special treatment to secured parties bears no substantial relation to the object of Section 11-203. The court’s interpretation of the statute thwarts the intent of the Equal Protection Clause that “all persons similarly circumstanced shall be treated alike.” *Reed, supra*.

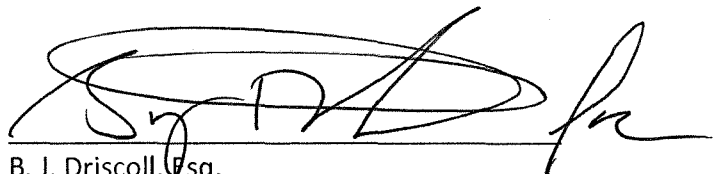
PAL submits that Section 11-203 is capable of only one reasonable and constitutional interpretation, namely that judgment debtors and secured parties must comply with the claim of exemption procedures. The court provided another interpretation of Section 11-203 that is neither reasonable nor constitutional. Applying the rule that "courts are obligated to 'seek an interpretation of a statute that upholds its constitutionality,'" *Hellickson, supra*, the court should apply Section 11-203 equally to both owners of property and secured parties with an interest in that same property, holding them both to the claim of exemption procedures of Section 11-203. As the party asserting the right to the proceeds from the sheriff's sale that the court has set aside, PAL has a sufficient interest in the matter to challenge the constitutionality of the court's interpretation.

V. CONCLUSION.

Based on the foregoing, the court should enter an order granting PAL's motion for reconsideration, vacating the Judgment filed January 3, 2011, entering an order vacating the Memorandum Decision, granting PAL's prior motion for summary judgment, and denying KeyBank's prior motion for partial summary judgment

DATED this 10th day of January, 2011.

SMITH, DRISCOLL & ASSOCIATES, PLLC

A handwritten signature in black ink, appearing to read "B. J. Driscoll", is written over a horizontal line.

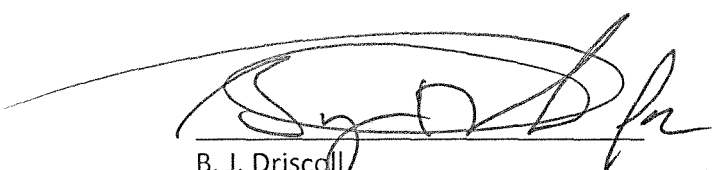
B. J. Driscoll, Esq.
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

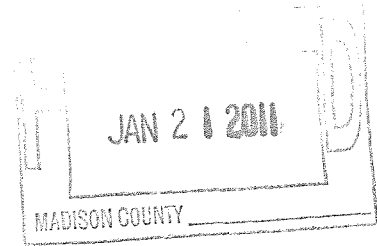
I HEREBY CERTIFY that on this 10th day of January, 2011, I caused a true and correct copy of the foregoing **BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

Thomas E. Dvorak, Esq.
Amber N. Dina, Esq.
GIVENS PURSLEY, LLP
601 West Bannock Street
Post Office Box 2720
Boise, Idaho 83701-2720
Facsimile: 208-388-1300

☒ U. S. Mail
☐ Fax
☐ Overnight Delivery
☐ Hand Delivery


B. J. Driscoll

Bryan D. Smith, Esq. — ISBN 4411
B. J. Driscoll, Esq. — ISBN 7010
SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Ave.
P.O. Box 50731
Idaho Falls, Idaho 83405
Telephone: (208) 524-0731
Facsimile: (208) 529-4166



Attorneys for Defendant
PAL I, LLC

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION, a
national banking association,

Plaintiff,

v.

PAL I, LLC, an Idaho limited liability company;
BRIAN CHRISTENSEN, an individual; L.A.
PARKINSON, an individual; BARNEY DAIRY,
INC.; D.J. BARNEY, an individual; WILLIAM
DAVIS, an individual; LOIS DAVIS, an
individual; DELL RAY BARNEY, an individual;
and DELL J. BARNEY, an individual, dba
Barney Towing & Recovery,

Defendants.

Case No. CV-2010-680

**REPLY BRIEF IN SUPPORT OF MOTION
FOR RECONSIDERATION**

I. INTRODUCTION.

The defendant, PAL I, LLC ("PAL"), files this brief in reply to KeyBank National Association's ("KeyBank") opposition to PAL's motion for reconsideration. As explained in this brief and PAL's moving brief, the court should grant PAL's motion for reconsideration, vacate the Judgment filed January 3, 2011, enter an order vacating the

Memorandum Decision, grant PAL's prior motion for summary judgment, and deny KeyBank's prior motion for partial summary judgment.

II. THE DISTRICT COURT ERRONEOUSLY CONSTRUES IDAHO CODE SECTION 11-203 INSTEAD OF APPLYING THE PLAIN LANGUAGE OF THE STATUTE.

KeyBank asserts that "where the words of a statute are subject to more than one meaning," the court should construe them in light of reason, public policy, and legislative history.¹ KeyBank then invites the court to construe Section 11-203 in a way that is favorable to KeyBank and that ignores the plain language of the statute.

Importantly, neither KeyBank nor the court ever identifies what words of Idaho Code Section 11-203 "are subject to more than one meaning." PAL submits there are none, that the words of Section 11-203 are plain, specific, mandatory, and that the court should apply them as written.

III. THE DISTRICT COURT DID NOT AND CANNOT CONSTRUE IDAHO CODE SECTION 11-203 IN A WAY THAT IS COMPLEMENTARY AND COHESIVE WITH IDAHO CODE SECTION 28-9-315.

KeyBank argues that Section 11-203 and Section 28-9-315 "both relate to the sale of secured property," and so the court properly construed Section 11-203 and Section 28-9-315 as complementary and cohesive.² In other words, KeyBank opines that the court gave meaning and agreement to the two sections.

However, the sections are not *in pari materia* because they do not relate to the same subject matter. *See State v. Gamino*, 148 Idaho 827, 829 (2010). Section 11-203 is

¹ See p. 3 of Plaintiff's Opposition to PAL I, LLC's Motion for Reconsideration, dated January 18, 2011, already on file with the court.

² See p. 4 of Plaintiff's Opposition to PAL I, LLC's Motion for Reconsideration, dated January 18, 2011, already on file with the court.

part of a statutory scheme devoted to enforcement of judgments in civil actions. Section 11-203 necessarily involves the conclusion of litigation by judgment, court issuance of a writ of execution, and a sheriff's sale. In contrast, Section 28-9-315 is part of Idaho's Uniform Commercial Code pertaining to secured transactions. Section 28-9-315 does not necessarily involve litigation, judgment, writ of execution, or sheriff's sale. Rather, Section 28-9-315 merely states the general rule under the UCC that an owner of collateral cannot extinguish a security interest by selling the collateral. The rule from Section 28-9-315 is inapplicable to the present case. Simply because two statutes make general reference to a security interest and the sale of property does not mean that they "relate to the same subject." Looking at the substance of the two statutes clearly reveals that they are not *in pari materia*.

Moreover, the court did not construe Section 11-203 and Section 28-9-315 in a complementary and cohesive manner. Rather, the court's Memorandum Decision construes Section 28-9-315 in a way that expands its application well beyond commercial transactions not involving litigation, while it construes Section 11-203 out of existence. There is no complement between statutes where the court's construction renders one of the statutes meaningless.

IV. THE WESTERN IDAHO CASE DEMONSTRATES THAT A SECURED CREDITOR MAY LOSE ITS SECURITY INTEREST IN COLLATERAL BY ITS CONDUCT.

In its moving brief, PAL cites to *Western Idaho Production Credit Ass'n v. Simplot Feed Lots, Inc.*, 106 Idaho 260, 263 (1984), for the proposition that a secured party may lose its rights in collateral by its failure to act despite the provisions of Section 28-9-

306(2) (now codified in Section 28-9-315). Specifically, PAL relies on the following statement from the Idaho Supreme Court in that case:

The *course of dealing* between WIPCA and the farmers and the policies of WIPCA *clearly indicate the authorization to sell* crops in which WIPCA held security interests and that WIPCA further authorized this particular sale by the farmers to Martin. See *First Nat. Bank, Etc. v. Iowa Beef Processors*, 626 F.2d 764 (10th Cir.1980). *Since WIPCA authorized the disposition of the collateral, it lost its security interest in the collateral* under the provisions of I.C. § 28-9-306(2).

Id. (emphasis added). The Court did not reach the issue of whether WIPCA waived its security interest, but nonetheless commented “that *those jurisdictions* which have allowed conditional authorization *have often held that the security interest is nonetheless lost* upon facts similar to the case at bar *upon the theory that the secured party has waived its security interest.*” *Id.* at 264 (emphasis added).

Whether classified as “authorization of sale by conduct” or “waiver,” the essence of *Western* is the same: A secured party can lose its security interest in collateral based on its failure to act. This result holds despite the Court’s consideration of the general rule from Section 28-9-306(2) (now Section 28-9-315) that a security interest continues in collateral notwithstanding sale.

KeyBank mischaracterizes the facts of *Western* and tries to distinguish that case by arguing that *Western* involved an “express authorization of sale.”³ This is not true. Both the Court and the secured party acknowledged that there was no express authorization in *Western*. If there was “express authorization,” then there would be no need for the court to discuss the “course of dealing” between WIPCA and the farmers.

³ See p. 5 of Plaintiff’s Opposition to PAL I, LLC’s Motion for Reconsideration, dated January 18, 2011, already on file with the court.

This is important because the Court in *Western* held the secured party lost its security interest in the collateral by failing to act, which is exactly what PAL asks the court to hold in this case, namely that KeyBank lost its security interest by failing to act as Section 11-203 requires.

V. KEYBANK PROVIDES NO AUTHORITY TO SUPPORT ITS ASSERTION THAT A "WAIVER" APPLIES ONLY TO DEBTORS.

Throughout its briefing on summary judgment and reconsideration, KeyBank asserts that "'waiver' of an exemption only applies to debtors."⁴ Stated conversely, KeyBank argues that a secured creditor cannot waive an exemption in collateral. However, KeyBank offers no authority in point for the proposition that a secured creditor cannot waive its security interest. In contrast, PAL has provided authority that a secured party may waive its interest in property just like a debtor. *See Western, supra; Clovis Nat'l Bank v. Thomas*, 425 P.2d 726, 732 (N.M. 1967).

VI. KEYBANK OFFERS NO RESPONSE TO THE IDAHO CODE'S REPEATED AND EXPRESS STATEMENTS THAT SECTIONS 8-507, ET SEQ., APPLY TO LEVY UPON PERSONAL PROPERTY UNDER TITLE 11 OF THE IDAHO CODE.

In its moving brief, PAL cited to four separate sections of the Idaho Code expressly requiring the application of Sections 8-507, et seq., to post-judgment executions on personal property. Section 11-301 specifically states, "The provisions of *sections 8-507 through 8-507D [not 8-506A]*, Idaho Code, *shall* apply to a levy upon personal property." I.C. § 11-301 (emphasis and brackets added). Section 8-527 specifically requires that "[i]f any personal property attached, garnished or executed

⁴ See, e.g., footnote 2 on p. 5 of Plaintiff's Opposition to PAL I, LLC's Motion for Reconsideration, dated January 18, 2011, already on file with the court.

upon be claimed by a third person as his property . . . *the same rules shall prevail as to the contents and making of said claim . . . as provided in section 11-203.*" (Emphasis added). See also I.C. §§ 11-203 and 11-203(a). Section 8-507(c) states, "The provisions of this section and sections 8-507A through 8-507D [not 8-506A], Idaho Code, shall apply to any levy by execution pursuant to *chapters 2 and 3, title 11, Idaho Code.*" I.C. § 8-507(c) (emphasis and brackets added).

KeyBank offers no response to the explicit statutory reference to the procedures of Section 8-507 for enforcement of judgments in civil actions, or to the notable absence of any reference to Section 8-506A that KeyBank relies on here. Instead, KeyBank continues to rely on a case (i.e., *Fulton v. Duro*) and statutes (i.e., Section 8-506A and Section 28-9-315) that predate the Idaho Legislature's enactment of Section 11-203 and asks the court to keep applying Section 8-506A without more.

VII. KEYBANK MISSTATES PAL'S POSITION THAT THE MEMORANDUM DECISION VIOLATES PAL'S CONSTITUTIONAL RIGHT TO EQUAL PROTECTION.

In its moving brief, PAL explained how the Memorandum Decision violates PAL's rights to Equal Protection because the Memorandum Decision requires owners of property to follow the claim of exemption procedures of Section 11-203 but does not require secured creditors to comply with those same procedures.⁵ As a result, the Memorandum decision grants greater rights in levied property to secured creditors than the very owners of the secured property without any rational basis for the distinction.

⁵ See pp. 13-16 of PAL's Brief in Support of Motion for Reconsideration, dated January 10, 2011, already on file with the court.

KeyBank misstates PAL's argument and instead refers to secured creditors and judgment creditors as the "different persons" in the analysis. The issue is whether the court violated PAL's right to Equal Protection when it excused KeyBank from complying with the mandatory language of Section 11-203 while acknowledging that the owner of the property would have been required to comply. KeyBank's argument fails to identify any rational basis for the court to excuse KeyBank's compliance with Section 11-203 while acknowledging that an owner/judgment-debtor must comply with Section 11-203 or waive her exemption.⁶

VIII. APPLICATION OF THE PLAIN LANGUAGE OF SECTION 11-203 DOES NOT VIOLATE KEYBANK'S RIGHT TO PROCEDURAL DUE PROCESS.

KeyBank argues that if the court holds that KeyBank lost its security interest by failing to comply with Section 11-203, the court would be violating KeyBank's right to procedural due process because KeyBank received no "meaningful notice" and had no "meaningful opportunity to respond."⁷ However, KeyBank cannot explain how the notice it admittedly received was not "meaningful" or how the procedure deprived KeyBank of a meaningful opportunity to respond.

In reality, PAL and the sheriff gave KeyBank meaningful notice. The Madison County Sheriff served a "third party claim of exemption packet" on KeyBank at both its Rexburg and Boise offices. This "packet" included copies of documents served on the judgment debtor, including the writ of execution, notice of attachment, notice of

⁶ See, e.g., footnote 2 on p. 5 of Plaintiff's Opposition to PAL I, LLC's Motion for Reconsideration, dated January 18, 2011, already on file with the court.

⁷ See pp. 8-9 of Plaintiff's Opposition to PAL I, LLC's Motion for Reconsideration, dated January 18, 2011, already on file with the court.

exemptions available under federal and state law, instructions to debtors and third parties for asserting a claim of exemption, and a form for making a claim of exemption. See I.C. §§ 11-203, 8-507, 8-507A, and 8-507C. Aside from the fact that KeyBank is a large and sophisticated banking association with more than 1,000 full service branches nationwide, the statutory form from Section 8-507C provides detailed instructions for KeyBank to respond—and explains the consequences if KeyBank failed to respond—as follows:

IMPORTANT LEGAL NOTICE/NOTICIA LEGAL IMPORTANTE

MONEY/PERSONAL PROPERTY BELONGING TO YOU MAY HAVE BEEN TAKEN OR HELD IN ORDER TO SATISFY A COURT JUDGMENT. YOU MAY BE ABLE TO GET YOUR MONEY/PROPERTY BACK SO READ THIS NOTICE CAREFULLY.

....
The sheriff has levied on your money and/or personal property. You have FOURTEEN (14) DAYS after the date of mailing or personal service of these documents to file a claim of exemption with the sheriff. An exemption from levy entitles you to obtain the release of your money and personal property. . . . If you believe the money or personal property that are being levied upon is exempt, you should immediately file a claim of exemption. ***If you fail to make a timely claim of exemption, the sheriff will release money to the plaintiff, or the property may be sold at an execution sale . . .***

(Caps in original; emphasis added.) Under these circumstances, KeyBank cannot argue that it did not receive meaningful notice.

Moreover, Section 11-203 provides secured creditors 14 days to respond to the notice that “[t]he sheriff has levied on your . . . personal property.” I.C. § 8-507C. To respond, all KeyBank had to do was fill out a two page form provided by the sheriff and mail it back to the sheriff. Had KeyBank complied, Section 11-203 would have shifted the burden to PAL to then file a motion to contest KeyBank’s claim of exemption.

Certainly, both the time to respond and the manner of responding provide KeyBank a "meaningful opportunity to be heard."

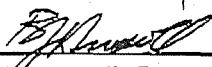
As KeyBank received both "meaningful notice" and a "meaningful opportunity to respond, the court's enforcement of Section 11-203 does not deprive KeyBank of procedural due process.

IX. CONCLUSION.

PAL continues to submit that Section 11-203 means what it says: A secured party must file a claim of exemption stating the grounds for the exemption and the amount thereof, or the sheriff must proceed to sell the property and deliver the proceeds to the plaintiff. Neither KeyBank nor the court has explained what else Section 11-203 means if not this. Based on the foregoing, the court should grant PAL's motion for reconsideration.

DATED this 21 day of January, 2011.

SMITH, DRISCOLL & ASSOCIATES, PLLC



B. J. Driscoll, Esq.
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21 day of January, 2011, I caused a true and correct copy of the foregoing **REPLY BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

Thomas E. Dvorak, Esq.
Amber N. Dina, Esq.
GIVENS PURSLEY, LLP
601 West Bannock Street
Post Office Box 2720
Boise, Idaho 83701-2720
Facsimile: 208-388-1300

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☒ Fax
☐ Overnight Delivery
☐ Hand Delivery


B. J. Driscoll

COURT MINUTES

CV-2010-0000680

Keybank National Association vs. PAL I, LLC, etal.

Hearing type: Motion

Hearing date: 1/24/2011

Time: 10:55 am

Judge: Gregory W Moeller

Courtroom: Brent J. Moss District Court

Court reporter: David Marlow

Minutes Clerk: Angie Wood

Tape Number:

MR. BRIAN SMITH

AMBER DINA

1055 J INTRO

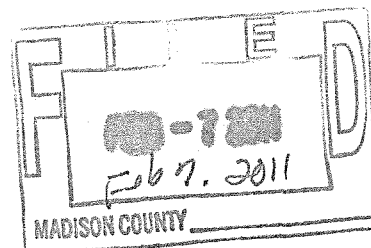
MR. SMITH ARGUES

MS. DINA RESPONDS

MR. SMITH RESPONDS

COURT WILL TAKE MATTER UNDER ADVISEMENT

Thomas E. Dvorak (ID State Bar ID# 5043)
 Amber N. Dina (ID State Bar ID# 7708)
 GIVENS PURSLEY LLP
 601 West Bannock Street
 Post Office Box 2720
 Boise, Idaho 83701-2720
 Telephone: 208-388-1200
 Facsimile: 208-388-1300
 1079991_1 [10894-2]



Attorneys for KeyBank National Association

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT FOR THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION, a
 national banking association,

Plaintiff,

v.

/PAL I, LLC, an Idaho limited liability
 company; /BRIAN CHRISTENSEN, an
 individual; /L.A. PARKINSON, an individual;
 /BARNEY DAIRY, INC.; /D.J. BARNEY, an
 individual; /WILLIAM DAVIS, an individual;
 /LOIS DAVIS, an individual; /DELL RAY
 BARNEY, an individual; and /DELL J.
 BARNEY, an individual, dba Barney Towing
 & Recovery,

Defendants.

Case No. CV 10-680

**NOTICE OF VOLUNTARY
 DISMISSAL WITHOUT
 PREJUDICE**

PLEASE TAKE NOTICE that pursuant to Rule 41(a)(1) of the Idaho Rules of Civil Procedure, Plaintiff KeyBank National Association, by and through its counsel of record, hereby voluntarily dismisses the above-entitled case without prejudice as against Defendants Brian Christensen, L.A. Parkinson, Barney Dairy, Inc., D.J. Barney, William Davis, Lois Davis, Dell Ray Barney and Dell J. Barney, dba Barney Towing & Recovery.

DATED this 7th day of February, 2011.

GIVENS PURSLEY, LLP

Amber N. Dina

Amber N. Dina

Attorneys for KeyBank National Association

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of February, 2011, a true and correct copy

of the foregoing was served on the following by the manner indicated:

Bryan D. Smith

B.J. Driscoll

SMITH DRISCOLL & ASSOCIATES, PLLC

414 Shoup Ave.

P.O. Box 50731

Idaho Falls, ID 83405

☐

Via U.S. Mail

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Via Hand-Delivery

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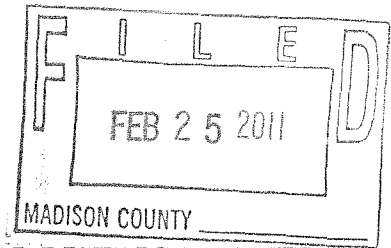
Via Overnight Delivery

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Via Facsimile 208-529-4166

Amber N. Dina

Amber N. Dina



IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR MADISON COUNTY

KEYBANK NATIONAL ASSOCIATION,)
a national banking association,)

Plaintiff,)

v.)

PAL I, LLC, an Idaho limited liability)
Company; BRIAN CHRISTENSEN, an)
individual; L.A. PARKINSON, an)
individual; BARNEY DAIRY, INC.;)
D.J. BARNEY, an individual; WILLIAM)
DAVIS, an individual; LOIS DAVIS, an)
individual; DELL RAY BARNEY,)
an individual; and DELL J. BARNEY,)
an individual, dba Barney Towing &)
Recovery,)

Defendants.)

Case No. CV-10-680

MEMORANDUM
DECISION ON
RECONSIDERATION

This matter was previously decided by the Court in its earlier Memorandum Decision of December 23, 2010, which granted summary judgment to Plaintiff ("KeyBank"). Defendants ("PAL") have now moved the Court to reconsider its decision. Following briefing and oral argument on January 24, 2011, the Court took the matter under advisement.

I. STANDARD OF REVIEW: MOTION TO RECONSIDER

Idaho Rule of Civil Procedure 11(a)(2)(B) affords parties an opportunity to seek reconsideration of any interlocutory order. "A motion for reconsideration . . . may be made at any time before the entry of final judgment but not later than fourteen (14) days after the entry of the final judgment." Judgment was entered in this matter on January 3, 2011.

PAL's motion for reconsideration was timely filed on January 10, 2011.

The Court notes that this rule provides an opportunity to review and reevaluate its decision in light of new arguments and further clarification of the parties' respective positions. A trial court clearly has substantial discretion in reviewing its own orders. Because this matter presents difficult, complex, and novel issues of law and statutory interpretation, the Court welcomes this opportunity to revisit its earlier decision.

II. DISCUSSION

The material facts in this matter are undisputed and were set forth in detail within the Court's previous decision.¹ They will not be repeated here. It is the Court's intent in this decision to address the issues raised by PAL in their motion for reconsideration and provide additional analysis and rationale in support of its final holding.

A. The Court correctly applied Idaho Code § 28-9-315(a)(1) to the facts of this case.

PAL contends the Court failed to follow the established rules of statutory construction by applying the provisions of I.C. § 28-9-315(a)(1) to this case, instead of relying solely on I.C. § 11-203. They suggest the Court erred in three ways: (1) by applying the provisions of a general statute instead of a specific statute, (2) by applying the provisions of an older statute instead of a more recent statute, and (3) by not finding that KeyBank waived its rights in the collateral. While the Court believes that this argument is based upon a false premise—that these two statutes are in direct conflict—the Court will respond to each point in turn.

1. The Court did not favor a general statute over a specific statute.

The Court acknowledges the firmly established rule of construction that a "specific statute will control over a general or vague statute when the two are in conflict." *Mickelsen v. City of Rexburg*, 101 Idaho 305, 307, 612 P.2d 542, 544 (1980) (citing *Christensen v. West*, 92 Idaho 87, 437 P.2d 359 (1968)). However, the Court disagrees with the assertions that I.C. § 11-203 is the more specific statute or that I.C. § 28-9-315(a)(1) is vague. While I.C. § 11-203 sets forth the general rules for making a claim of exemption in all cases, I.C. § 28-9-315 sets forth the specific rules applicable to all secured interests. It sets forth situations where a secured interest survives a transfer of ownership, including a "sale, lease,

¹ See Memorandum Decision, pp. 2-4 (December 22, 2010).

license, exchange or other disposition.” While it does not directly mention levy by execution, this is certainly covered by “other disposition.” It hardly seems logical to conclude that the Idaho Legislature intended to grant the holder of a prior secured interest priority against every type of subsequent transfer, except for a levy pursuant to execution.

The Court notes that Official Comment 2 to I.C. 28-9-315 indicates that this law “derives from . . . the general rule that a security interest survives disposition of collateral.” The mere reference to deriving a statute from a “general rule” does not mean the statute itself is general. Idaho Code § 28-9-315 is contained in Article 9 of Idaho’s Uniform Commercial Code, which contains specific and detailed rules for dealing with secured interests. These provisions are intended to cover all transactions related to a secured interest. See I.C. § 28-9-109. The word “general” can hardly describe such thorough and meticulous legislation.

Assuming that the statutes are in conflict, it would be hard to say which is the more specific. Certainly I.C. § 11-203 contains a specific scheme for dealing with claims of exemption, including third party secured interests. However, it contains no provisions for changing the priority of secured interests whether they are claimed or not. It merely grants a judgment creditor the right of possession when a claim of exemption is not filed. Although it mentions the treatment of a third party’s security interest, it does not distinguish between perfected and unperfected secured interests. Idaho Code § 28-9-315 deals with both. Interestingly, I.C. 8-506A, which PAL also claims is inapplicable, specifically references protections afforded to “perfected security interests.” Perfection is an important part of this analysis because PAL had constructive notice of KeyBank’s third party claim.

The Court concludes both statutes are sufficiently specific, but about different areas of the law. If I.C. § 11-203 contained a provision for extinguishing or postponing the priority of a perfected secured interest, perhaps there would be a conflict with the priority rules in I.C. § 28-9-315. As will be discussed further below, there is no such conflict.

2. The Court did not favor an older statute over a newer statute.

The Court is also mindful that it should favor a more recent statute when there is a conflict with an older statute. In *Mickelsen*, the Supreme Court explained the when “two governmental promulgations are in irreconcilable conflict, the one enacted later in time governs.” 101 Idaho at 307, 612 P.2d at 544. However, this rule is countered by the caveat that the Court should not assume that the Legislature did not know what it was doing at the

time it passed the later statute. “Statutes are construed under the assumption that the legislature was aware of all other statutes and legal precedence at the time the statute was passed.” *Druffel v. State, Dept. of Transp.*, 136 Idaho 853, 856, 41 P.3d 739, 742 (2002).

First, the Court must examine PAL’s underlying premise that because I.C. § 11-203 is the newer law, it controls. Idaho Code § 11-203 was adopted in 1991. Idaho Code § 28-9-315 was adopted in 2001. While it is true that an earlier version of I.C. § 28-9-315 was originally adopted in 1967, it was specifically repealed by S.L. 2001, ch. 208, § 1. PAL argues in their brief that the current I.C. § 28-9-315 is “nearly identical” to the former 28-9-306(2).² See S.L.1967, ch. 161. However, it is not the same law. As noted in Official Comment 2 to I.C. § 28-9-315, “[s]ubsection (a)(1) . . . *derives* from the former Section 9-306(2).” (Emphasis added). The fact that the current law is “derived” from a prior law does not mean that the enactment date of the prior law controls. Therefore, in the case at hand, the Court cannot find that I.C. § 11-203 is the more recent law.

Furthermore, applying *Druffel* to the disputed statutes in this case, the Court cannot assume, as PAL would have it do, that the Idaho Legislature was completely unmindful of I.C. § 11-203 when it amended the Article 9 of the Uniform Commercial Code. When a law is revised or updated 34 years later, the Court should assume that every provision was considered and approved by the Legislature.³ Therefore, even assuming I.C. § 11-203 is in “irreconcilable conflict” with I.C. § 28-9-315, it cannot conclude as a matter of law that I.C. § 11-203 is the more recent statute and, therefore, takes precedent in this case.

3. The Court correctly applied the waiver doctrine.

PAL also contends that the Court incorrectly “suggests” that a “perfected secured creditor like KeyBank cannot waive its security interest in collateral.”⁴ The Court has reviewed its prior decision, and cannot find such a suggestion. The Court did hold, however, that a perfected secured creditor does not lose its priority position by failing to comply with the claim of exemption procedure in I.C. § 11-203. Such language simply does not exist in I.C. § 11-203. The Court previously concluded that PAL could attach an interest equal to the

² Brief in Support of Motion for Reconsideration, p. 7, fn. 6 (January 11, 2011).

³ Similarly, as will be discussed more fully below, the Court should also assume that the Legislature was aware of the Supreme Court’s holding in *Fulton v. Duro*, 107 Idaho 240, 687 P.2d 1367 (Ct. App. 1984) when both competing statutes, I.C. § 11-203 and I.C. § 28-9-315(a)(1), were passed in 1991 and 2001 respectively.

⁴ Brief in Support of Motion for Reconsideration, p. 8.

judgment debtor's right in the property at issue, but this interest would be subordinate to KeyBank's perfected security interest in the subject property.

PAL cites *Western Idaho Production Credit Ass'n v. Simplot Feed Lots, Inc.*, 106 Idaho 260, 678 P.2d 52 (1984) ("*WIPCA*"), for the proposition that security interests can be waived. The Court has reviewed *WIPCA* closely and finds it distinguishable from the circumstances of this case. In *WIPCA*, the Idaho Supreme Court held that the sale of a secured party's interests in certain goods was valid because the secured party authorized the sale. This was based upon their finding that:

The course of dealing between *WIPCA* and the farmers and the policies of *WIPCA* clearly indicate the authorization to sell crops in which *WIPCA* held security interests and that *WIPCA* further authorized this particular sale . . .

106 Idaho at 263, 678 P.2d at 55. Thus, at most *WIPCA* stands for the proposition that a secured party can waive its secured interest through an established course of dealing or by authorizing the sale. Nevertheless, PAL claims that *WIPCA*'s "failure to act" is analogous to KeyBank's conduct in the case at hand.⁵ The Court disagrees. KeyBank's failure to file a claim of exemption under I.C. § 11-203 constitutes neither a "course of dealing" nor an "authorization" which would allow PAL to supplant KeyBank's priority position in the collateral.

The Court has also reviewed the New Mexico case of *Clovis Nat. Bank v. Thomas*, 77 N.M. 554, 425 P.2d 726 (1967), cited by PAL. While the Court agrees that this case holds that a secured party *can* waive its secured interest in collateral by "implied acquiescence or consent," 77 N.M. at 563, 425 P.2d at 732, the waiver in *Clovis* came from "a course of conduct as well as by express words." 77 N.M. at 561, 425 P.2d at 730. In that respect, *Clovis* does not support PAL's position any better than *WIPCA* does.

The Idaho Supreme Court has long held that "waiver is a voluntary, intentional relinquishment of a known right or advantage." *Brand S Corp. v. King*, 102 Idaho 731, 734, 639 P.2d 429, 432 (1981). See also *Crouch v. Bischoff*, 78 Idaho 364, 304 P.2d 646 (1956); and *Hopkins v. Hemsley*, 53 Idaho 120, 22 P.2d 138 (1933). In the case at hand, the Court can find no evidence in the record that KeyBank intentionally waived its right to the secured

⁵ Reply Brief in Support of Motion for Reconsideration, p. 5 (January 21, 2011).

collateral. In fact, KeyBank has consistently asserted its rights.⁶ As will be discussed further below, the failure to comply with I.C. § 11-203 did not extinguish KeyBank's secured interest in the collateral, it only authorized the sheriff to transfer possession to the judgment creditor. In the absence of an expressed waiver or any evidence of an established a course of dealings amounting to a waiver, the Court cannot conclude the KeyBank voluntarily or intentionally relinquished its secured interest in the collateral.

B. The Court correctly applied Idaho Code § 8-506A to the facts of this case.

This Court held in its earlier Memorandum Decision that I.C. § 8-506A, which specifically protects "perfected security interests" from attachment, is applicable to this case. The Court relied upon the following holding from *Fulton v. Duro*, 107 Idaho 240, 246, 687 P.2d 1367, 1373 (Ct. App. 1984):

We believe that the legislature intended that the method of levying under a writ of attachment was also to be used to levy under a writ of execution. "[A]ll ... property both real and personal, or any interest in either real or personal property, ... may be attached on execution *in like manner* as upon writs of attachment." I.C. § 11-201.

(Emphasis added). Although I.C. § 8-506A only references attachments, *Fulton* appears to make it applicable to a levy upon execution as well.

PAL argues that I.C. § 8-506A has no relevance to this case for three reasons: (1) the holding in *Fulton* only applies to real property, (2) unlike I.C. § 11-203, it is a permissive statute, and (3) *Fulton* was decided before the passage of I.C. § 11-203, thereby making its "in like manner" rule inapplicable. The Court will address each concern in order.

PAL contends that the Court erred in relying upon *Fulton* because it dealt with real property, not personal property. While it is true that *Fulton* concerned real property, its

⁶ Although KeyBank did not fill out and return the Claim of Exemption form, on April 28, 2010 it mailed a written objection and informed PAL that the attached property was its secured collateral. Aff. of Amber N. Dina in Support of Plaintiff's Motion for Partial Summary Judgment against PAL I (October 4, 2010). See also Exhibit E and G to Plaintiff's Complaint. KeyBank also sent letters to PAL and the Madison County Sheriff's Office seeking to postpone the sheriff's sale scheduled for June 9, 2010 until the competing claims to the collateral were resolved. Plaintiff's Complaint, Exhibits G and H.

holding was based upon a statute that expressly applies to both real and personal property—I.C. § 11-201. PAL has failed to establish that this distinction makes a difference.

PAL also makes much of the fact that I.C. § 11-203 uses the mandatory language “shall,” while I.C. § 8-506A allegedly uses the permissive term “may.” Even if such semantic conjecture were based in fact, which it is not, it is purely academic here. A closer examination of I.C. § 8-506A(a) reveals that it applies to “*all* secured parties with a perfected security interest” and that the attachment “*shall* be subject to the rights of the secured party . . .” (Emphasis added). Similarly, I.C. § 8-506A(b) applies to “*any* secured party” and the attaching creditor “*shall* be subrogated to the rights of the secured party . . .” (Emphasis added). This is not permissive language. The rules and procedures set forth in Idaho Code § 8-506A, as they apply to this case, are clearly mandatory.

Of greater concern to the Court is PAL’s third contention that because *Fulton* (decided in 1984) predates I.C. § 11-203 (passed 1991), it is not controlling. This argument deserves further scrutiny. PAL spent considerable time at oral argument noting that I.C. § 11-203 specifically references only I.C. §§ 8-507A and 8-507C. It further notes that I.C. § 11-301, which concerns writs of execution, expressly states that I.C. §§ 8-507 through 8-507D apply to a levy on personal property. Therefore, it concludes that I.C. § 8-506A cannot be applied to the claim of exemption rules set forth in I.C. § 11-203. Furthermore, if *Fulton* is not controlling, the prejudgment attachment rules in I.C. §§ 8-506A through 8-506D would have no bearing on the post-judgment procedures in I.C. § 11-203.

While the Court understands and appreciates the logic of PAL’s position, it is uncertain whether all the conclusions drawn by PAL are correct. For example, I.C. §§ 8-507 through 8-507D set forth service and notice requirements for a writ of execution and apply to levies on personal property pursuant to I.C. § 11-301. However, this does not necessarily mean the attachment rules for perfected security interests in personal property are inapplicable under I.C. § 11-203. Furthermore, the reference to only I.C. §§ 8-507A and 8-507C in I.C. § 11-203 does not actively “exclude” the applicability of any other statutes.

The fact that *Fulton* predates I.C. § 11-203 does concern the Court. *Fulton* does not specifically address claims of exemption. It is primarily concerned with the procedural aspects of execution. However, nothing about the holding in *Fulton* was changed by the adoption of I.C. § 11-203. Further, there is no reason for the Court to assume that 11-203

was a calculated and intentional effort to change the law in response to *Fulton*. Nevertheless, I.C. § 11-203 does set forth rules for levying upon executed property that did not exist at the time of *Fulton*. However, notwithstanding PAL's arguments to the contrary, a closer examination of how secured parties are treated in I.C. §§ 11-203 and 8-506A reveals that there is no actual conflict between the statutes.

Initially, the Court notes, that I.C. § 8-506A is consistent with other Idaho statutes that focus on priority and perfection. Besides its obvious consistency with I.C. § 28-9-315, it also reflects the preference for perfected secured interests set forth in I.C. § 28-9-322(a):

(a) Except as otherwise provided in this section, priority among conflicting security interests and agricultural liens in the same collateral is determined according to the following rules:

(1) Conflicting perfected security interests and agricultural liens rank according to priority in time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the security interest or agricultural lien is first perfected, if there is no period thereafter when there is neither filing nor perfection.

(2) A perfected security interest or agricultural lien has priority over a conflicting unperfected security interest or agricultural lien.

(3) The first security interest or agricultural lien to attach or become effective has priority if conflicting security interests and agricultural liens are unperfected.

Similarly, Official Comment 2 to I.C. § 28-9-308, which allows for "continuous perfection," explains:

[I]n general, after perfection the secured party is protected against creditors and transferees of the debtor and, in particular, against any representative of creditors in insolvency proceedings instituted by or against the debtor.

See also I.C. § 28-9-317(a)(2) ("a security interest . . . is subordinate to the rights of . . . a person that becomes a lien creditor before the earlier of the time: (A) the security interest or agricultural lien is perfected; or (B) one (1) of the conditions specified in section 28-9-203(b)(3) is met and a financing statement covering the collateral is filed.")

Idaho's approach to preserving the priority of secured interests is consistent with long established rules directly related to the facts of this case. As stated in 68A Am Jur 2d Secured Transactions § 288 (1993) "a creditor with a perfected security interest has priority over . . . the purchaser of the collateral at an execution sale on a subsequent judgment lien held by another creditor . . ." Additionally, "a judgment lien on personal property dates from the time of levy under the judgment so that the judgment lien is subordinate to a security

interest which had been perfected by a prior filing.” 68A Am Jur 2d Secured Transactions § 891 (1993). Furthermore, “Article 9 has also been applied expansively to reach the conclusion that a secured creditor who has perfected an interest under the Code has priority over all other interests in the collateral unless there is some provision in the Code that expressly declares otherwise.” 68A Am Jur 2d Secured Transactions § 882 (1993).

Most importantly, Idaho *has not* adopted a statute which expressly declares that the holder of a perfected security interests loses its preferred position by failing to respond to a claim of exemption. Instead, I.C. § 11-203(c) only mandates that the failure to file a claim of exemption allows the sheriff to “sell or deliver the property.” The fatal flaw in PAL’s position is that I.C. § 11-203 does not grant them the remedy they are seeking—a complete waiver of KeyBank’s security interest in the collateral.⁷ The mere sale or delivery of the collateral by the sheriff does not vitiate the perfected creditor’s rights or postpone the priority of its security interest.

If the Idaho Legislature had intended waiver, forfeiture, or postponement of the secured interest to be the result of noncompliance with I.C. § 11-203, it could have expressly provided for such a result.⁸ However, the requirement that the sheriff deliver the collateral to a subsequent creditor does not expressly extinguish the perfected secured creditor’s priority to the proceeds or the collateral. In other words, the interests of a subsequent creditor in possession of the collateral would still be subordinated to the rights of a prior secured creditor. As a result, the subsequent creditor in possession would have no more rights than the original debtor in possession had prior to execution. With this understanding, there is clearly no inherent conflict between I.C. §§ 11-203, 8-506A, or 28-9-315(a)(1).

Given the Court’s previous conclusion that the UCC provisions concerning perfected security interests are controlling (see I.C. § 28-9-315(a)(1)), the application of I.C. § 8-506A is not essential to its holding in this case. The Court acknowledges that there may be some ambiguity as to the state of the law, especially for unperfected security interests, given the

⁷ PAL claims that the Court’s Memorandum Decision was “particularly troubling” because it “fails to recognize” the penalties for not filing a claim of exemption. Brief in Support of Motion for Reconsideration, p. 5. However, PAL has failed to recognize that “sale or delivery” do not extinguish the secured creditor’s priority in the collateral. Just as the original debtor owned and possessed the collateral subject to the secured interests of the creditor, the purchaser at an execution sale would own or possess the collateral subject to the same secured interests.

⁸ For example, see Iowa Code §§ 626.42 and 626.48. This statute expressly postpones the priority of the claimed security interest and grants priority to the subsequent judgment creditor.

date of the *Fulton* decision and the subsequent passage of I.C. § 11-203. Nevertheless, the Court concludes as a matter of law that neither I.C. §§ 8-506A nor 28-9-315(a)(1) are superseded by the provisions of I.C. § 11-203.⁹

C. The Court's ruling does not violate the Equal Protection Clause.

Finally, PAL argues that the Court's Memorandum Decision violates PAL's right to equal protection, guaranteed by the Fourteenth Amendment to the U.S. Constitution, by giving secured creditors greater rights than the owners of collateral. The Court takes such a contention very seriously. Having taken an oath to uphold the U.S. and Idaho Constitutions, the Court would never desire to reach an unconstitutional result, even unintentionally. Therefore, the Court has given careful consideration to Pal's arguments.

The basis for this argument is PAL's belief that "the Court interpreted I.C. § 11-203 in a manner which gives secured parties greater rights in levied property than the owner of levied property."¹⁰ This allegedly occurred when the Court concluded that KeyBank "did not waive its security in the property" by failing to file a claim of exemption.¹¹ However, as explained above, PAL bases this argument on an incorrect interpretation of the remedies provided in I.C. § 11-203(c). Nowhere in this statute does it state that a secured creditor "waives its security in the property" by failing to file a claim of exemption. Instead, it only provides that possession of the collateral may be transferred by the sheriff. The statute contains no further sanctions, such as waiver, forfeiture, or postponement of the secured interest.

Even if PAL has interpreted I.C. § 11-203(c) correctly, there is still no equal protection issue here. Curiously, PAL relies heavily on the Idaho Supreme Court's decision in *Credit Bureau of Eastern Idaho, Inc. v. Lecheminant*, 149 Idaho 467, 235 P.3d 1188 (2010). The *Lecheminant* case, which both the Court and counsel for PAL are familiar with, involved a statute which was not gender neutral. The Supreme Court held that Idaho Code § 11-204 was unconstitutional because "it treats husbands and wives unequally." 149 Idaho at ___, 235 P.3d at 1191. However, the decision also clearly noted that "[t]he Supreme Court

⁹ The Court's holding notwithstanding, it believes that the better practice for KeyBank would have been to file a claim of exemption and avoid the resulting confusion and expense of resolving priority after sale or delivery.

¹⁰ Brief in Support of Motion for Reconsideration, p. 14.

¹¹ v. .

of the United States has consistently held that the Equal Protection Clause does not prohibit states from treating different classes of people differently.” *Id.* (citing *Reed v. Reed*, 404 U.S. 71, 75, 92 S.Ct. 251, 253-54, 30 L.Ed.2d 225, 229 (1971)).

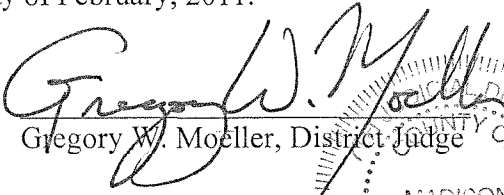
The Court’s analysis, in both this decision and its prior Memorandum Decision, is not based on any suspect classes, such a gender, race, or religion. It is merely attempting to define the respective rights of two classes of persons: perfected secured creditors and subsequent judgment creditors. Inasmuch as our laws are full of such classifications, the Court sees no equal protection issue here. For example, the United States Bankruptcy Code (U.S. Code, Title 11), the Uniform Commercial Code-Secured Transactions (I.C. §§ 28-9-101, et seq.), and even the Idaho Constitution (see Idaho Const., Article XV, Section 3, “Water Rights”), all set forth systems for ascertaining the respective rights, priorities, and preferences afforded to persons based upon defined classifications. Any demarcation of rights among the different classes of people mentioned in this decision was done by statute, not the whim of the Court. There is a constitutional basis for these classifications. They do not arbitrarily discriminate between similarly situated persons and they are based upon established principles of priority and justice. This Court, in holding that one possessing a perfected security interest is entitled to priority over a subsequent creditor with a judgment lien, is following a firmly established statutory scheme that is built upon a solid constitutional foundation. Again, the Idaho Legislature defined these classifications—not the Court.

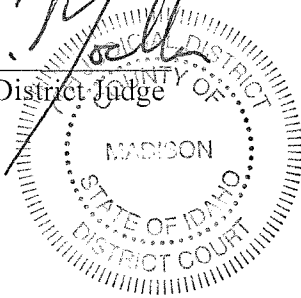
Contrary to PAL’s contention, the Court has not exempted secured creditors from the consequences of I.C. § 11-203(c)—it has only explained those consequences. Similarly, it has not held that secured creditors cannot voluntarily waive their priority position—it has only held that I.C. § 11-203(c) does not mandate such a result. Therefore, the Court concludes as a matter of law that it has not violated the principles of equal protection—it has merely interpreted and enforced the law as drafted by the legislature and interpreted by the judiciary.

III. CONCLUSION

The Court has carefully reconsidered its prior Memorandum Decision. It appreciates the opportunity to refine its decision based upon the outstanding briefing and oral arguments of the attorneys for both sides. The original decision was a difficult one, but the exemplary work of the attorneys has substantially clarified the issues and the law for the Court. To the extent that the reasoning or rationale of its prior decision has changed materially, this decision on reconsideration is controlling. However, the result has not changed. Defendant's motion to reconsider is, therefore, DENIED.

SO ORDERED this 25th day of February, 2011.


Gregory W. Moeller, District Judge



CERTIFICATE OF SERVICE

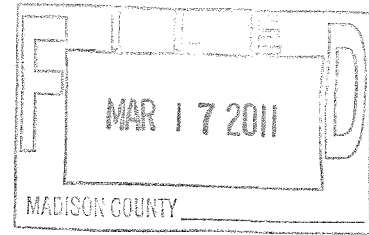
I hereby certify that a true and correct copy of the foregoing Memorandum Decision on Reconsideration was, on this 25 day of February, 2011, served upon the following individuals via U.S. Mail, postage prepaid:

Bryan D. Smith
B.J. Driscoll
SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Ave.
P.O. Box 50731
Idaho Falls, Idaho 83405

Thomas E. Dvorak
Amber N. Dina
GIVENS PURSLEY LLP
601 West Bannock St.
P.O. Box 2720
Boise, Idaho 83701-2720

By: Angie Wood
Court Clerk

Bryan D. Smith, Esq. – ISBN 4411
B. J. Driscoll, Esq. – ISBN 7010
SMITH, DRISCOLL & ASSOCIATES, PLLC
414 Shoup Ave.
P.O. Box 50731
Idaho Falls, Idaho 83405
Telephone: (208) 524-0731
Facsimile: (208) 529-4166



Attorneys for Defendant/Appellant
PAL I, LLC

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION, a
national banking association,

Plaintiff,

v.

PAL I, LLC, an Idaho limited liability company;
BRIAN CHRISTENSEN, an individual; L.A.
PARKINSON, an individual; BARNEY DAIRY,
INC.; D.J. BARNEY, an individual; WILLIAM
DAVIS, an individual; LOIS DAVIS, an
individual; DELL RAY BARNEY, an individual;
and DELL J. BARNEY, an individual, dba
Barney Towing & Recovery,

Defendants.

Case No. CV-2010-680

NOTICE OF APPEAL

**TO: KEYBANK NATIONAL ASSOCIATION, Plaintiff/Respondent, and THOMAS E.
DVORAK, ESQ., and AMBER N. DINA, ESQ., ITS ATTORNEYS OF RECORD; and TO
THE CLERK OF THE ABOVE-ENTITLED COURT;**

NOTICE IS HEREBY GIVEN THAT:

1. The above-named defendant/appellant, PAL I, LLC ("PAL"), appeals to the
Idaho Supreme Court from the Seventh Judicial District Court's Judgment entered
January 3, 2011 and from the Seventh Judicial District Court's Memorandum Decision on

Reconsideration entered February 25, 2011 in the above-entitled action against PAL and in favor of the above-named plaintiff/respondent, the Honorable Gregory W. Moeller, District Judge, presiding.

2. PAL has the right to appeal to the Idaho Supreme Court, and the Judgment and Memorandum Decision on Reconsideration described in paragraph one above are subject to appeal pursuant to Idaho Appellate Rule 11(a).

3. The issues which PAL intends to assert on appeal are the following:

a. Did the district court commit reversible error by concluding that the plaintiff was entitled to the sale proceeds of personal property sold at sheriff's sale to satisfy a judgment against a judgment debtor where the plaintiff with notice failed to file any third party claim of exemption asserting any security interest in the personal property of the judgment debtor?

4. There has been no order entered sealing any portion of the record in this case;

5. PAL does not request a transcript;

6. PAL requests the following documents be included in the clerk's record in addition to those automatically included under Rule 28, Idaho Appellate Rules:

a. Defendant's Motion for Summary Judgment dated October 4, 2010;

b. Defendant's Brief in Support of Motion for Summary Judgment dated October 4, 2010;

c. Affidavit of Suzanne Bagley dated October 1, 2010;

- d. Affidavit of B. J. Driscoll dated October 4, 2010;
- e. Plaintiff's Motion for Partial Summary Judgment dated October 4, 2010;
- f. Defendant's Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment Against PAL, dated October 15, 2010;
- g. Defendant's Reply Brief in Support of PAL's Motion for Summary Judgment And Motion to Strike dated October 25, 2010;
- h. Defendant's Motion for Reconsideration dated January 10, 2011;
- i. Defendant's Brief in Support of Motion for Reconsideration dated January 10, 2011;
- j. Defendant's Reply Brief in Support of Motion for Reconsideration dated January 21, 2011;

7. I certify:

- (a) That the estimated fee for preparation of the clerk's record has been paid;
- (b) That the appellate filing fee has been paid; and
- (c) That service has been made upon all parties required to be served pursuant to Idaho Appellate Rule 20.

DATED this 16th day of March, 2011.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: 

Bryan D. Smith
Attorneys for Defendant PAL I, LLC

CERTIFICATE OF SERVICE

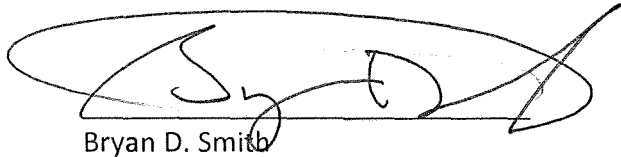
I HEREBY CERTIFY that on this 16th day of March, 2011, I caused a true and correct copy of the foregoing **NOTICE OF APPEAL** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

Thomas E. Dvorak, Esq.
Amber N. Dina, Esq.
GIVENS PURSLEY, LLP
601 West Bannock Street
Post Office Box 2720
Boise, Idaho 83701-2720
Facsimile: 208-388-1300

☒ U. S. Mail
☐ Fax
☐ Overnight Delivery
☐ Hand Delivery

Marilyn R. Rasmussen
134 Main
P.O. Box 389
Rexburg, Idaho 83440

☒ U. S. Mail
☐ Fax
☐ Overnight Delivery
☐ Hand Delivery



Bryan D. Smith

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION)	
a national banking association)	
)	
Plaintiff-Respondent)	SUPREME COURT NO. 38645-2011
)	COURT CASE NUMBER CV-2010-680
vs)	CLERK'S CERTIFICATE OF
)	APPEAL
PAL I, LLC, an Idaho limited liability)	
Company)	
Defendant-Appellant)	
)	
and)	
)	
BRIAN CHRISTENSEN, an individual; L.A.)	
PARKINSON, an individual; BARNEY)	
DAIRY, INC.; D.J. BARNEY, an individual;)	
WILLIAM DAVIS, an individual; LOIS DAVIS,)	
an individual; DELL RAY BARNEY an)	
individual; and DELL J. BARNEY, an)	
individual, dba Barney Towing & Recovery)	
)	
Defendants)	

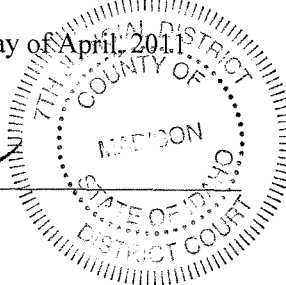
APPEAL FROM: 7th Judicial District Madison County
HONORABLE Gregory W. Moeller PRESIDING
CASE NO. FROM COURT: CV-2010-680
ORDER OF JUDGMENT APPEALED FROM: Judgment dated, January 3, 2011 and
Memorandum Decision on Reconsideration, dated February 25, 2011
ATTORNEY FOR APPELLANT: Bryan D. Smith, PO Box 50731, Idaho Falls, ID 83405
ATTORNEY FOR THE RESPONDENT: Thomas E. Dvorak, PO Box 2720, Boise, ID
83701-2720
APPEALED BY: PAL I, LLC
APPEALED AGAINST: KeyBank National Association
NOTICE OF APPEAL FILED: March 17, 2011
AMENDED NOTICE OF APPEAL FILED: NA
NOTICE OF CROSS-APPEAL FILED: NA
AMENDED NOTICE OF CROSS-APPEAL FILED: NA
APPELLATE FEE PAID: Yes
RESPONDENT OR CROSS RESPONDENT'S REQUEST FOR ADDITIONAL
RECORD: NA
WAS DISTRICT COURT REPORTER'S TRANSCRIPT REQUESTED?: NO
IF SO, NAME OF REPORTER: NA

Dated this 9th day of April, 2011

KIM H. MUIR

BY

[Signature]



IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR MADISON COUNTY

KEYBANK NATIONAL ASSOCIATION)
a national banking association)

PLAINTIFF- RESPONDENT)

VS)

PAL I, LLC, an Idaho Limited Liability Co))

DEFENDANT-APPELLANT)

And)

BRIAN CHRISTENSEN an individual; LA)
PARKINSON, an individual; BARNEY)
DAIRY, INC.; DJ BARNEY, an individual)
WILLIAM DAVIS, an individual; LOIS)
DAVIS, an individual; DELL RAY)
BARNEY, an individual; DELL J)
BARNEY, an individual, dba Barney)
Towing & Recovery)

SUPREME COURT NO.38645-2011

CASE NO. CV-2010-680

CERTIFICATE OF EXHIBITS

I, Gwen Cureton, Deputy Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for Madison County, do hereby certify that the following is a list of the exhibits, offered or admitted and which have been lodged with the Supreme Court or retained as indicated:

NO. DESCRIPTION

SENT/RETAINED

None

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of
the said Court this 14 day of June, 2011.

CERTIFICATE
I HEREBY CERTIFY THE
FOREGOING INSTRUMENT
TO BE A TRUE AND COR-
RECT COPY OF THE ORIG-
INAL ON FILE IN MY
OFFICE.

DATED June 14, 2011
Kim H. Muir
Madison County Clerk,
Auditor and Recorder.
Clerk of the District Court

By Deputy

Kim H Muir
CLERK OF THE DISTRICT COURT



IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION)

A national banking association)

PLAINTIFF-RESPONDENT)

VS)

PAL I, LLC, an Idaho Limited Liability Co)

DEFENDANT-APPELLANT)

BRIAN CHRISTENSEN an individual; LA)

PARKINSON, an individual; BARNEY)

DAIRY, INC.; DJ BARNEY, an individual)

WILLIAM DAVIS, an individual; LOIS)

DAVIS, an individual; DELL RAY)

BARNEY, an individual; and DELL J)

BARNEY, an individual, dba Barney)

Towing & Recovery.)

DEFENDANTS)

CLERK'S CERTIFICATE

SUPREME CT NO. 38645-2011

CASE NO. CV-2010-680



I, Kim H Muir, Clerk of the District Court of the 7th Judicial District of the State of Idaho, in and for the County of Madison, do hereby certify that the foregoing Clerk's Record in the above entitled cause was compiled and bound under my direction and contains true and correct copies of all pleadings, documents and papers designated to be included under Rule 28, IAR, the Notice of Appeal, any Notice of Cross Appeal, and any additional documents requested to be included.

I further certify that all documents, x-rays, charts and pictures offered or admitted as exhibits in the above entitled cause, if any, will be duly lodged with the Clerk of the Supreme Court with any Reporter's Transcript and the Clerk's Record (except for exhibits, which are retained in the possession of the undersigned), as required by Rule 31 of the Appellate Rules.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 14 day of June, 2011.

KIM H MUIR
CLERK OF THE DISTRICT COURT

By 
Deputy Clerk

CERTIFICATE
I HEREBY CERTIFY THE
FOREGOING INSTRUMENT
TO BE A TRUE AND COR-
RECT COPY OF THE ORIG-
INAL ON FILE IN MY
OFFICE.
DATED 
Kim H. Muir
Madison County Clerk,
Auditor and Recorder.
Clerk of the District Court
By  Deputy

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF MADISON

KEYBANK NATIONAL ASSOCIATION)

PLAINTIFF-RESPONDENT)

VS)

PAL I, LLC, an Idaho Limited Liability Co)

DEFENDANT-APPELLANT)

And)

BRIAN CHRISTENSEN an individual; LA)
PARKINSON, an individual; BARNEY)
DAIRY, INC.; DJ BARNEY, an individual)
WILLIAM DAVIS, an individual; LOIS)
DAVIS, an individual; and DELL RAY)
BARNEY, an individual; DELL J BARNEY)
an individual, dba Barney Towing &)
Recovery)

CERTIFICATE OF SERVICE
CASE NO. CV-2010-680
SUPREME CT NO. 38645-2011

I, Gwen Cureton, Deputy Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Madison, do hereby certify that I have personally served or mailed, by United States Mail, postage prepaid, one copy of the Clerk's Record and any Reporter's Transcript to each of the parties or their Attorney of Record as follows:

ATTORNEY FOR APPELLANT
Bryan D Smith
PO Box 50731
Idaho Falls, ID 83405

ATTORNEY FOR RESPONDENT
Thomas E Dvorak
PO Box 2720
Boise, ID 83701-2720

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of
the said Court this 14 day of June, 2011

KIM H MUIR
CLERK OF THE DISTRICT COURT

By [Signature]
Deputy Clerk

